Supreme Court, U.S.
FILED

06-772 NOV 29 2006

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No.

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

OLIVIA RUX, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Under the "terrorism exception" of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), which requires as a condition for subject matter jurisdiction that the terrorist act must have been "caused by" material support provided by the defendant foreign state, is a rule permissible that requires allegations in the complaint that show a "reasonable connection," but not a causal connection, between the alleged material support and the terrorist act?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: Republic of Sudan.

Plaintiffs-Appellees and Respondents: Olivia Rux, individually and as next friend for I.M.O., a minor; Jamie Owens, individually and as next friend for I.M.O., a minor; Sharla Costelow, individually and as next friend for E.C. and B.C., minors; Novella Wiggins, individually and as next friend for J.R.M., Jr., a minor; Lorrie D. Triplett, individually and as next friend for Andrea Triplett and Savannah Triplett; Jennifer Clodfelter, individually and as next friend for Noah Clodfelter; Kenyon Embry, individually and as next friend for Capri Dumar; Ronald W. Francis; Jacqueline Saunders, individually and as next friend for I.S. and J.S., minors; Sandra Francis; Rogelo Santiago; Simeona Santiago; Sarah Guana Esquivel; Jesse Nieto; Thomas Wibberly; Patricia A. Wibberly; Theodis Triplett; Wayne Triplett; Reed Triplett; Gary Swenchonis, Sr.; Deborah Swenchonis; Shalala Swenchonis; Kate Brown; Sean Walsh; Kevin Roy; Lou Gunn; Mona Gunn; Jamal Gunn; Jason Gunn; Anton J. Gunn; Leroy Parlett; Etta Parlett, individually and as next friend for H.P., a minor; Kera Miller; Matthew Parlett; John Clodfelter; Gloria Clodfelter; Joseph Clodfelter; Toni Wibberly; Diane McDaniels; Teresa Smith; George Costelow; Dorothy Costelow; and Frederica McDaniels-Bess.

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PETITION FOR A WRIT OF CERTIORARI

The Republic of Sudan ("Sudan") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit, dated September 1, 2006, is officially reported at 461 F.3d 461, and is reproduced at App. A, 1a–26a.

The Memorandum Opinion and Order of the U.S. District Court for the Eastern District of Virginia, Norfolk Division, dated August 26, 2005, is unofficially reported at 2005 WL 2086202 and 2005 U.S. Dist. LEXIS 36575 and is reproduced at App. B, 27a-82a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit sought to be reviewed was entered on September 1, 2006. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 28 U.S.C. §§ 1330(a), 1604 and 1605(a)(7) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611 ("FSIA"). The relevant statutory provisions are reproduced at App. C, 83a-85a.

STATEMENT OF THE CASE

This action arises from the October 12, 2000 bombing of the *USS Cole* in Aden Harbor in Yemen. The Plaintiffs are relatives of sailors killed in the bombing, which they allege was planned and executed by the terrorist organization Al Qaeda. App. 3a.

Sudan is a foreign sovereign state located in northeast Africa. Under U.S. law, Sudan, as a foreign sovereign, is entitled to immunity and the U.S. courts have no subject matter jurisdiction unless the case falls within one of the exceptions to sovereign immunity in 28 U.S.C. § 1605(a) of the FSIA. *See* 28 U.S.C. § 1604 (2000); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Plaintiffs' action is based solely upon the "terrorist" exception in § 1605(a)(7), which provides an exception to immunity in any case:

> in which money damages are sought against a foreign state for personal injury or death that was *caused by* an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee,

> or agent of such foreign state while acting within the scope of his or her office, employment, or agency [with certain exceptions not applicable here].

28 U.S.C. § 1605(a)(7) (2000 and Supp. III (2005)) (emphasis added).[1]

The issues in this Petition arise from Sudan's motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction. Accordingly, in order to sustain jurisdiction under § 1605(a)(7), the factual allegations of Plaintiffs' complaint, assumed to be true, must furnish the basis for jurisdiction – including a factual basis for a finding that the *USS Cole* bombing was caused by an act of Sudan or by material support provided by Sudan. *See, e.g., Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Because Plaintiffs' complaint contains no allegation of fact that would show Sudan engaged directly in the bombing, the § 1605(a)(7) exception applies in this case only if the terrorist act was "caused by" material support or resources provided by Sudan.[2]

Plaintiffs' complaint contains a number of non-specific, conclusory allegations with respect to Sudan's involvement in the *USS Cole* bombing. For example, Plaintiffs allege that "[t]he bombing of the U.S.S. Cole was an act of international terrorism knowingly and deliberately aided and abetted by Defendant Republic of the Sudan." App. 9a. However, such

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[1] Section 1605(a)(7) is set out in full at App. 84a-85a.

[2] The allegations of Plaintiffs' complaint purporting to show jurisdictional causation are quoted in the Fourth Circuit's opinion at App. 8a-11a.

general, unsupported allegations are insufficient to establish subject matter jurisdiction, and the courts below did not rely upon them.[3] Plaintiffs' complaint also contains specific factual allegations that purport to show that Sudan provided material support to Al Qaeda. However, these allegations do not show a causal connection between the alleged material support and the *USS Cole* bombing.

In the District Court, Sudan moved to dismiss Plaintiffs' complaint under Rule 12(b)(1) on the ground, *inter alia*, that Plaintiffs' factual allegations do not support subject matter jurisdiction under § 1605(a)(7). Neither Sudan nor Plaintiffs submitted any evidentiary materials, so that Sudan's motion to dismiss was considered solely on the basis of Plaintiffs' complaint. *See Phoenix Consulting, Inc.*, 216 F.3d at 40. On August 26, 2006, the District Court denied Sudan's motion to dismiss. App. 81a-82a. The District Court reasoned that Plaintiffs' allegations, if supplemented with additional facts not alleged but which Plaintiffs later might be able to prove, could establish the required causal connection. App. 48a.

Sudan appealed the District Court's denial of its motion to dismiss to the U.S. Court of Appeals for the Fourth Circuit. Sudan's interlocutory appeal was taken pursuant to 28 U.S.C. § 1291 and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994) ("Orders denying sovereign immunity are immediately

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[3] To sustain subject matter jurisdiction the plaintiff must allege the specific, or "actual," facts that constitute the basis of such jurisdiction. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 146 (2d Cir. 2001).

appealable collateral orders."). On September 1, 2006, the Fourth Circuit affirmed the order of the District Court denying Sudan's motion to dismiss. App. 26a. The Fourth Circuit held that the "caused by" requirement of § 1605(a)(7) is satisfied by allegations that show a "reasonable connection" between the alleged material support and the terrorist act and that Plaintiffs' allegations constituted such a showing. App. 20a-21a.

Sudan petitions this Court for review of the Fourth Circuit's decision holding that the jurisdictional causation requirement of § 1605(a)(7) is satisfied by a "reasonable connection" test.

REASONS FOR GRANTING THE PETITION

This Court has never addressed the substantive requirements of § 1605(a)(7), the "terrorist exception" of the FSIA. One critical requirement for subject matter jurisdiction under this exception is that the damage from the terrorist act be "caused by" material support provided by the foreign state. However, the Fourth Circuit has adopted a rule that permits a plaintiff to establish subject matter jurisdiction under § 1605(a)(7) by alleging facts that show a "reasonable connection," but not a causal connection, between alleged material support provided by the foreign state and the terrorist act.

The Fourth Circuit's rule is contrary to the decisions of this Court and lower courts that require subject matter jurisdiction to be established by allegations of the specific facts that support it. The Fourth Circuit's rule also subjects the foreign sovereign to the burdens of litigation, including discovery, even though the plaintiff is unable to allege facts that meet the requirements Congress set.

This Court should grant certiorari to address the jurisdictional causation requirement of § 1605(a)(7) and correct the unwarranted rule adopted by the Fourth Circuit.

I. THE FOURTH CIRCUIT'S STANDARD FOR SUBJECT MATTER JURISDICTION CONFLICTS WITH THE REQUIREMENTS OF THE STATUTE AND THE DECISIONS OF THIS COURT.

A. The Fourth Circuit's "Reasonable Connection" Test Fails To Give Effect To The Requirement Of § 1605(a)(7) That The Terrorist Injury Must Be "Caused By" The Foreign State's Alleged Material Support.

As a condition of subject matter jurisdiction, § 1605(a)(7) requires that the terrorist act must be "caused by" material support provided by the defendant foreign state. However, the Fourth Circuit held that the causation requirement is instead satisfied by a "reasonable connection":

> Plaintiffs must establish jurisdictional causation by alleging facts sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damage arising out of a terrorist attack.

App. 20a. The Fourth Circuit thus equates "reasonable connection" with causation. However, "reasonable connection" is a different test, and the effect of the Fourth Circuit's substitution of its standard for that of the statute is to eliminate the requirement that the plaintiff plead facts that

(if assumed to be true) show the terrorist act was caused by the foreign state's material support.[4]

The manner in which the Fourth Circuit applied its "reasonable connection" standard shows that the test does not require a causal connection between the material support allegedly provided and the terrorist act. The specific allegations in the Plaintiffs' complaint that the Fourth Circuit identified as satisfying its test were:

> that Sudan allowed Al-Qaeda to use its diplomatic pouch to ship explosives, allowed Al-Qaeda operatives to enter [Sudan]; granted Al-Qaeda relief from taxes, allowed Al-Qaeda to operate terrorist training camps in [Sudan] that provided instruction on the use of explosives, and allowed an Al-Qaeda operative to ship explosives from Sudan to Yemen, the site of the bombing.

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[4] The Fourth Circuit apparently regarded its "reasonable connection" test as a formulation of the proximate cause standard. App. 20a. However, for the proximate cause test to be relevant, the act must first be a *cause in fact* of the event. *See Restatement (Third) of Torts* § 26 (Tentative Draft No. 2, 2002) ("An actor's tortious conduct must be a factual cause of another's physical harm for liability to be imposed."); W. Keeton et al., *Prosser & Keeton on the Law of Torts* 265 (5th ed. 1984) ("[A] basic essential of legal cause is causal connection in fact . . ."). If the act is a cause in fact of an event, then a showing must be made that it is also a proximate cause, which is a cause that is "so closely connected with the result and of such significance that the law is justified in imposing liability." *Prosser & Keeton* at 264.

App. 20a. However, none of these allegations shows a causal connection between any of Sudan's alleged acts of material support and the *USS Cole* bombing.

Thus, as the Fourth Circuit notes, Plaintiffs allege that Sudan permitted the use of a diplomatic pouch to ship explosives and permitted an Al Qaeda operative to ship explosives to Yemen. However, there is no allegation that provides a causal connection of either alleged act with the bombing of the *USS Cole*. For example, there is no allegation that the explosives allegedly transported were used in the *USS Cole* bombing or even that they were a type of explosives that might have been used. Moreover, Plaintiffs make no allegations as to the dates when the alleged shipments occurred. Given that Plaintiffs allege that Sudan's support of Osama bin Ladin and Al Qaeda commenced in 1991 (App. 11a), any of the alleged acts of support could have occurred as long as nine years before the bombing. Plaintiffs' allegations may refer to acts that allegedly took place years before the terrorist act and had no relation to it.

The other specific allegations that the Fourth Circuit cites as satisfying its "reasonable connection" test similarly lack any showing of causal connection. Allegations that Sudan allowed Al Qaeda operatives to enter the country and that it granted tax relief to Al Qaeda provide no causal connection at all with the *USS Cole* bombing. The allegation that Sudan allowed Al Qaeda to operate terrorist training camps that provided instruction in the use of explosives omits any allegation that any operative trained in the alleged camps participated directly or indirectly in the *USS Cole* bombing.[5]

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[5] The analysis upon which the District Court held that Plaintiffs had adequately pled causation shows even more clearly what is

The Fourth Circuit stated that Plaintiffs' allegations satisfied its "reasonable connection" standard "by describing how Sudan provided al-Qaeda a base of operations to plan and prepare for the bombing, and provided operational support for the attack." App. 21a. However, Plaintiffs' specific allegations of fact do neither of these things. There is no factual allegation that shows a "base of operations" in Sudan was used to plan or prepare for the bombing, nor is there any allegation of fact that supports the contention that Sudan provided operational support for the attack.

In sum, the "reasonable connection" test omits the requirement of the statute that the terrorist act must be "caused by" the foreign state's alleged material support. Indeed, this is the very point of the Fourth Circuit's substitution of "reasonable connection" for "caused by." The

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lacking in Plaintiffs' allegations. The District Court upheld the allegations, not on the facts pled, but on hypothetical facts that Plaintiffs might later be able to prove. Thus, the District Court ruled the Plaintiffs' allegation that explosives were shipped to Yemen was sufficient to show causation on the ground that "if Plaintiffs manage to prove that Sudan permitted the transport of explosives to Yemen *around the time of the Cole bombing*, Sudan could reasonably be linked to the attack." App. 48a (emphasis added). Similarly, the District Court found that "if Plaintiffs managed to prove that the Al-Qaeda operatives who carried out the Cole bombing were trained in camps tacitly endorsed by Sudan, proximate cause could possibly be established." *Id.* And the District Court held that "if Plaintiffs can prove at the liability phase that Sudan's financial dealings with Osama bin Ladin and Al-Qaeda provided the organization with the resources and opportunity to carry out the attack, legal causation could be established." *Id.* Plaintiffs alleged none of these hypothetical facts; yet in each instance the additional fact is necessary because Plaintiffs' allegation alone does not support causation.

facts alleged by Plaintiffs do not show causation, as the court acknowledges:

> Although the allegations describe actions on the part of Sudan that *could have* supported and facilitated the bombing, they do not chart a direct and unbroken factual line between Sudan's actions and the bombing.

App. 20a-21a (emphasis added). Only by formulating and applying a test that omits the statutory requirement of causation can Plaintiffs' allegations be said to be sufficient.

B. The Decisions The Fourth Circuit Relied Upon Do Not Support Its "Reasonable Connection" Standard.

The Fourth Circuit's cited authority does not support its conclusion that a "reasonable connection" is sufficient to show the terrorist act was "caused by" the foreign state's alleged material support.

The Fourth Circuit relies upon *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-538 (1995), citing that decision as "reject[ing] an attempt to require close temporal and spatial proximity between a harm and the action that allegedly caused it." App. 19a. However, the Fourth Circuit's reliance is misplaced because the cited discussion in *Grubart* addressed only the issue of proximate cause, not causation-in-fact. In *Grubart*, the defendant, Great Lakes Dredge & Dock Co. ("Great Lakes") drove pilings into the bed of the Chicago River as part of its repair work on certain bridge piers. The pilings were alleged to have weakened the walls of a railroad tunnel running beneath the river; six months later the tunnel flooded and carried water

from the river into a number of buildings in downtown Chicago. The building owners and others sued Great Lakes.

This Court's discussion in *Grubart* upon which the Fourth Circuit relied does not address causation-in-fact. It expressly assumes that the damage was in fact caused by Great Lakes. At the outset of the pertinent discussion, this Court states:

> Because the injuries suffered by Grubart and the other flood victims were caused by a vessel on navigable water [*i.e.*, Great Lake's vessel], the location inquiry [*i.e.*, the question whether the damage was "caused by a vessel on navigable water" within the meaning of the controlling statute, 46 U.S.C. App. § 740] would seem to be at an end. . . .

Id. at 535. This Court's following discussion, upon which the Fourth Circuit relied, addresses the argument that, even if the damage was caused by Great Lakes' act, the damage was not close enough in time and space to support liability because the flood did not occur until six months after the pilings were set and at a relatively remote location from Great Lakes' activities. This Court held that the application of the proximate cause test was appropriate to define the limit of Great Lakes' liability. However, the application of this test assumes the existence of causation-in-fact. Indeed, it is axiomatic that an act cannot be a "proximate cause" of an injury unless it did in fact cause the injury.[6] Driving the pilings could not be the "proximate cause" of the damage to the flooded buildings in *Grubart* unless it was in fact the pile-

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[6] See note 4 above.

driving that weakened the railroad tunnel and permitted the influx of the river water.

Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123 (D.C. Cir. 2004), also relied upon by the Fourth Circuit, offers no valid support for the Court's application of the "reasonable connection" test in this case. *Kilburn* rejected Libya's argument that the "but-for" test of causation required the court to dismiss the action against Libya if Libya was only one of two states equally responsible for the terrorist act in issue. *Id.* at 1127-30. *Kilburn* approved the application of the proximate cause test, stating that it was following *Grubart*. *Id.* at 1128. However, *Kilburn* does not hold that causation-in-fact need not be shown or that a "reasonable connection" test without a causation-in-fact requirement is sufficient. Indeed, the facts in *Kilburn* render any discussion of cause-in-fact or proximate cause purely academic. The plaintiffs in *Kilburn* alleged that agents supported and directed by Libya purchased and assassinated an American hostage, Peter Kilburn. On the facts alleged, the causal connection was beyond dispute.

C. The Fourth Circuit's Test Is In Conflict With The Decisions Of This Court And Lower Courts That Require The Plaintiff To Affirmatively Allege The Facts That Establish Subject Matter Jurisdiction.

This Court has always required that a plaintiff must allege the facts that support subject matter jurisdiction. *See, e.g., Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) (allegation of plaintiff's citizenship to support diversity jurisdiction); *Thomas v. Bd. of Trustees of Ohio State Univ.*, 195 U.S. 207, 218 (1904) (same). In the federal courts, "the facts providing the court jurisdiction must be affirmatively alleged in the complaint." *Pinkley, Inc. v. City of Frederick*,

Md., 191 F.3d 394, 399 (4th Cir. 1999). Thus, for example, in pleading diversity jurisdiction, a plaintiff must allege not merely that the parties are citizens of different states, but must allege the particular states of which the parties are citizens. *See, e.g., Chem. Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 177 F.3d 210, 222 n.13 (3d Cir. 1999). "It is a universal rule . . . that a party who invokes the jurisdiction of a federal court must allege all facts necessary to give the court jurisdiction of the subject matter." *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952).

The allegations supporting subject matter jurisdiction must be "actual facts," not legal conclusions couched as factual allegations. In *Papasan v. Allain*, 478 U.S. 265, 286 (1986), a case involving an alleged breach of trust and deprivation of constitutional equal protection, this Court refused to accept plaintiffs' allegation that they had been deprived of a "minimally adequate education" because they alleged "no actual facts" in support of their assertion, such as allegations that they had not been taught to read or write or that they had received no instruction even in the educational basics.

In *Robinson v. Gov't of Malaysia*, 269 F.3d 133 (2d Cir. 2001), a case brought under the tort exception in § 1605(a)(5) of the FSIA, the plaintiff alleged that his injuries were "caused by the recklessness, carelessness and negligence" of the foreign sovereign in maintaining and operating the premises in New York City where the injury occurred. 269 F.3d at 145. The court dismissed the complaint because it did not allege the specific elements of negligence upon which liability would exist under New York law. The court ruled that:

> To sustain federal jurisdiction on generic allegations of "negligence . . . caused by" a

> "dangerous and defective condition," . . . absent an assertion or evidence of a factual predicate for such jurisdiction, would invite plaintiffs to circumvent the jurisdictional hurdle of the FSIA by inserting vague and conclusory allegations of tortious conduct in their complaints – and then to rely on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable substantive law. This is at odds with the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction.

Id. at 146.

Indeed, the rule the Fourth Circuit applied in this case violates the basic principles of subject matter jurisdiction. A court cannot proceed at all in the adjudication of any matter unless the court does in fact have subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause.") (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). Concluding that the litigation can proceed even though the plaintiff has not alleged facts that meet the relevant jurisdictional requirements is akin to accepting "hypothetical jurisdiction," a jurisprudential approach that has been squarely rejected by this Court. *See Steel Co.*, 523 U.S. at 101.

The Fourth Circuit's acceptance of Plaintiffs' allegations that fail to show a causal connection is in conflict with the basic principles of subject matter jurisdiction. The Fourth

Circuit has permitted Plaintiffs to proceed with their case on the ground that they may later come up with appropriate additional facts to show that the court possesses such jurisdiction. By doing so, the Fourth Circuit has exceeded the scope of subject matter jurisdiction granted by Congress in the FSIA.

II. THE FOURTH CIRCUIT'S RULE IS IN CONFLICT WITH THE DECISIONS THAT ESTABLISH THE FOREIGN SOVEREIGN'S RIGHT TO PROTECTION FROM THE BURDENS OF LITIGATION, INCLUDING DISCOVERY.

In actions brought in U.S. courts, a foreign state is entitled to sovereign immunity if there is no subject matter jurisdiction under the FSIA. Moreover, "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (quoting *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir. 1989)). Accordingly:

> In order to preserve the full scope of [sovereign] immunity, the district court must make the "critical preliminary determination" of its own jurisdiction as early in the litigation as possible; to defer the question is to "frustrate the significance and benefit of entitlement to immunity from suit." [*Foremost-McKesson,* 905 F.2d] at 449.

Phoenix Consulting, 216 F.3d at 39. If, as here, the allegations of a plaintiff's complaint fall short of the jurisdictional requirements, U.S. courts have no subject

matter jurisdiction and a plaintiffs' complaint must be dismissed. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 361 (1993); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994).

The Fourth Circuit's rule denies the foreign sovereign the right to this "critical preliminary determination" because it accepts as sufficient allegations that do not establish the causal connection necessary for subject matter jurisdiction. Moreover, the inadequacy of the allegations that the Fourth Circuit permits under its rule makes it impossible for Sudan to challenge subject matter jurisdiction by introducing evidence of its own that shows jurisdiction is lacking. Sudan is in the position of having to prove a number of negatives – *e.g.*, that between 1991 and 2000 it never permitted the shipment of any explosives that could have been used in the *USS Cole* attack. The lack of factual allegations connecting the alleged material support to the terrorist act prevents Sudan from making a meaningful factual response.

The Fourth Circuit clearly contemplates that Plaintiffs will be permitted to use discovery to find the causal connection that is lacking in their allegations. The court recognizes that Plaintiffs "must ultimately establish substantive causation" (App. 18a), and presumably they will be permitted to use discovery to do so. In producing the evidence that establishes the causal connection that is required by substantive law, the court reasons, Plaintiffs will at the same time be supplying the causal connection necessary to support subject matter jurisdiction. Thus, the Plaintiffs' discovery in support of their substantive claims will be used to supply the missing links in their allegations of subject matter jurisdiction.

However, a plaintiff is not permitted to use the discovery powers of the court in order to attempt to unearth facts that

would establish the subject matter jurisdiction of the court. For example, in *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992), the Fifth Circuit rejected the plaintiff's position that, because it had alleged jurisdiction under the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), it was "entitled to pursue discovery to support its allegations." The court held that "[a]t the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* In *Arriba*, subject matter jurisdiction depended upon a certain "Commission" being the agent of Petroleos Mexicanos, Mexico's national oil company, as the plaintiff had alleged. The court refused to allow plaintiff to conduct discovery to attempt to establish the agency relationship. *Id.* at 536-537.

Indeed, permitting the plaintiff to conduct discovery to find the specific facts necessary for subject matter jurisdiction would violate the principle of *Steel Co.* A plaintiff that was unable to allege facts that show the court has subject matter jurisdiction would be permitted to use the power of the court – its discovery procedures – to attempt to find facts that could establish that jurisdiction.

While such a rule would have profound implications for general federal court jurisdiction, it would have an even more severe impact on foreign sovereigns, which are accorded protection from discovery except as clearly required. *See In re Papandreou,* 139 F.3d 247, 253 (D.C. Cir. 1998). Where, as here, the lawsuit is based upon the terrorist exception of the FSIA, the potential discovery will necessarily involve matters that are highly sensitive to the foreign state. Yet under the Fourth Circuit's rule, private parties are to be permitted to conduct discovery into these matters, without

even having been able to allege facts showing the activities of the foreign state caused the injury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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November 29, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

05-2003

[Filed September 1, 2006]

Olivia Rux, individually and as next friend for I.M.O., a minor; Jamie Owens, individually and as next Friend for I.M.O., a minor; Sharla Costelow, individually and as next friend for E.C. and B.C., minors; Novella Wiggins, individually and as next friend for J.R.M., Jr., a minor; Lorrie D. Triplett, individually and as next friend for Andrea Triplett and Savannah Triplett; Jennifer Clodfelter, individually and as next friend for Noah Clodfelter; Kenyon Embry, individually and as next friend for Capri Dumar; Ronald W. Francis; Jacqueline Saunders, individually and as next friend for I.S. and J.S., minors; Sandra Francis; Rogelo Santiago; Simeona Santiago; Sarah Guana Esquivel; Jesse Nieto; Thomas Wibberly; Patricia Wibberly; Theodis Triplett; Wayne Triplett; Reed Triplett; Gary Swenchonis, Sr.; Deborah Swenchonis; Shalala Swenchonis; Kate Brown; Sean Walsh; Kevin Roy; Lou Gunn; Mona Gunn; Jamal Gunn; Jason Gunn; Anton J. Gunn; Leroy Parlett;

Etta Parlett, individually and as next friend for H.P., a minor; Kera Miller; Matthew Parlett; John Clodfelter; Gloria Clodfelter; Joseph Clodfelter; Toni Wibberly; Diane Mcdaniels; Teresa Smith; George Costelow; Dorothy Costelow; Frederica Mcdaniels-Bess,
Plaintiffs-Appellees,

v.

Republic of Sudan,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia at Norfolk
Robert G. Doumar, Senior District Judge
(CA-04-428-2)

JUDGES Before WIDENER and DUNCAN, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation. Judge Duncan wrote the opinion, in which Judge Widener and Judge Floyd joined.

OPINION

DUNCAN, Circuit Judge:

In this action for damages brought against it by relatives of American sailors killed in the terrorist bombing of the U.S.S. Cole ("Plaintiffs"), the Republic of Sudan ("Sudan") appeals an order of the district court largely denying its motion to dismiss. On appeal, Sudan argues both that the district court erred in denying its motion to dismiss for lack

of subject matter jurisdiction and also that this court should exercise pendent appellate jurisdiction over, and reverse, the district court's denial of its motion to dismiss for lack of personal jurisdiction and improper venue. Sudan also argues that this court should exercise pendent appellate jurisdiction over and consider for the first time its motion to dismiss for lack of standing, an issue on which the district court deferred action. Because we find that the district court's exercise of subject matter jurisdiction was proper and that there is no basis to exercise pendent appellate jurisdiction over the remaining issues, we affirm the district court's denial of Sudan's motion to dismiss for lack of subject matter jurisdiction and dismiss the remainder of Sudan's appeal.

I.

This case arises out of the October 12, 2000, bombing of the U.S.S. Cole in which seventeen American sailors were killed. The bombing, alleged in the Amended Complaint to have been planned and executed by the terrorist organization Al-Qaeda, occurred while the ship was berthed in Aden Harbor in Yemen. Plaintiffs, consisting of more than fifty surviving family members of the sailors who were killed, brought this action to recover for damages resulting from their deaths.

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C.A. §§ 1602-1611 (West 1994 & Supp. 2006), generally immunizes foreign states such as Sudan from suit in federal court. *See* § 1604. Section 1605(a)(7) of FSIA, however, provides an exception for suits against state sponsors of terrorism for damages arising from certain terrorist acts identified in the statute. § 1605(a)(7). Plaintiffs invoked § 1605(a)(7) based on allegations that Sudan had provided various forms of support to Al-Qaeda both during

the years preceding and in the orchestration of the bombing of the U.S.S. Cole.

Plaintiffs filed their original complaint on July 16, 2004, and subsequently amended it several times. They effected service of process on Sudan on December 16, 2004. When Sudan failed to answer within the prescribed time, the Clerk of Court entered default against it. Plaintiffs then moved for default judgment, which the district court scheduled for hearing. Before the date of the hearing, Sudan filed a Motion to Vacate Entry of Default and Cancel Evidentiary Hearing. In that motion, Sudan argued that the district court lacked personal jurisdiction because of insufficient process and service of process. Following a hearing on Sudan's motion, the district court vacated the entry of default with Plaintiffs' consent but held that Sudan had waived its right to contest personal jurisdiction and that Plaintiffs had effected proper service on Sudan.

On August 3, 2005, Sudan filed its Motion to Dismiss Plaintiffs' Amended Complaint with Prejudice. In that motion, Sudan argued (1) that the court lacked subject matter jurisdiction under FSIA because Plaintiffs failed to plead sufficient jurisdictional facts; (2) that Sudan lacked sufficient minimum contacts with Virginia to support personal jurisdiction; (3) that venue was improper in the Eastern District of Virginia; (4) that Plaintiffs' process was insufficient; (5) that Plaintiffs' service of process was insufficient; and (6) that Plaintiffs had failed to state a claim on which relief could be granted for various reasons, including lack of standing.

On August 26, 2005, the district court entered the order, which is at issue in this appeal, denying most of Sudan's motion to dismiss. In that order, the district court held:

(1) that Plaintiffs had pleaded sufficient facts to support subject matter jurisdiction under § 1605(a)(7); (2) that Sudan had waived its right to contest personal jurisdiction, service of process, and venue; (3) that Plaintiffs had nevertheless effected proper service of process on Sudan; (4) that the district court had personal jurisdiction over Sudan; and (5) that the Eastern District of Virginia was a proper venue for the suit. The district court took under advisement Sudan's motion to dismiss for failure to state a claim until after Sudan filed an answer. In so doing, the district court specifically deferred ruling on Sudan's argument that Plaintiffs lacked standing. Sudan timely appealed.

In this appeal, Sudan argues that the district court erred in denying its motion to dismiss for lack of subject matter jurisdiction under FSIA, an issue that is subject to interlocutory review. Sudan also asks us to exercise pendent appellate jurisdiction to review the district court's rulings on the issues of personal jurisdiction and venue. Sudan finally asks us to exercise pendent appellate jurisdiction over and decide the issue of standing, even though the district court has not yet ruled on it. We consider each of Sudan's arguments in turn.

II.

We first address Sudan's argument that Plaintiffs failed to allege sufficient facts in the Amended Complaint to establish subject matter jurisdiction under FSIA.[1] "The existence of

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[1] We have jurisdiction to review this issue because "[o]rders denying sovereign immunity are immediately appealable collateral orders." *Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994).

subject matter jurisdiction under [FSIA] . . . is a question of law" that we review de novo. *Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994). For reasons that follow, we reject Sudan's argument.

FSIA provides that, subject to certain limited exceptions, "a foreign state shall be immune from the jurisdiction of the courts of the United States." § 1604. One exception to such immunity arises in claims against a foreign state for injuries resulting from certain acts of terrorism. *See* § 1605(a)(7).[2] Under § 1605(a)(7), "victims of terrorism [can] sue countries that have been designated state sponsors of terrorism by the State Department . . . for those countries' provision of 'material support' for terrorist acts." *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 230 (4th Cir. 2004) (citing § 1605(a)(7)). This so-called "terrorist exception" has the following jurisdictional requirements: (1) the provision of material support by a state sponsor of terrorism; (2) the provision of such support by an official of the state "while

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[2] Section 1605(a)(7) provides that a foreign state that has been designated as a state sponsor of terrorism is not immune from a suit

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

§ 1605(a)(7).

acting within the scope of his or her office, employment, or agency"; and (3) a causal link between the material support and damage resulting from an act of terrorism. *See* § 1605(a)(7).

A foreign state's challenge[3] to subject matter jurisdiction in an action brought pursuant to the terrorist exception to FSIA may be based on either (1) the inadequacy of the pleadings as a matter of law; or (2) a denial of the allegations in the complaint. *Phoenix Consulting, Inc.*, 216 F.3d at 40. In the first instance, the foreign state does not challenge the plaintiff's allegations of fact; in the second, the district court must resolve the factual dispute in ruling on the motion to dismiss. *Id.* Sudan's motion to dismiss here was based solely on the legal sufficiency of the pleadings. In other words, this appeal presents no contested issues of fact and we accept Plaintiffs' allegations as true for purposes of determining jurisdictional sufficiency. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 352 U.S. App. D.C. 284, 294 F.3d 82, 93 (D.C. Cir. 2002); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 284 U.S. App. D.C. 333, 905 F.2d 438, 440 n. 3 (D.C. Cir. 1990).

The standard we apply in assessing Sudan's challenge "is similar to that of Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the

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[3] "Because sovereign immunity is in the nature of an affirmative defense, the plaintiff need not prove the absence of sovereign immunity in the first instance; rather, 'the defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.'" *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 104 (D.D.C. 2006) (citing *Phoenix Consulting, Inc. v. Republic of Angola*, 342 U.S. App. D.C. 145, 216 F.3d 36, 40 (D.C. Cir. 2000)) (emphasis omitted).

facts alleged that, if proven, would provide grounds for relief." *Price*, 294 F.3d at 93. Plaintiffs need not set out every fact on which jurisdiction under § 1605(a)(7) depends. *Id.* Rather, they must include sufficient facts to support a reasonable inference that their claims satisfy the terrorist exception and, therefore, that an exercise of subject matter jurisdiction is appropriate. *Owens*, 412 F. Supp. 2d at 106; *see Price*, 294 F.3d at 93-94.

The Amended Complaint broadly alleges that Sudan "provided material support in the form of funding, direction, training and cover to Al-Qaeda, a worldwide terrorist organization whose operatives facilitated the planning and execution of the bombing of the U.S.S. Cole." Am. Compl. at 2. More specifically, the Amended Complaint contains the following jurisdictional allegations:

> 26. Defendant Republic of Sudan, by and through officials, employees or agents acting knowingly and willfully, used funds and other assets belonging to the Republic of the Sudan to provide material support and resources to Osama bin Ladin and to Al Qaeda, the perpetrators of the bombing of the U.S.S. Cole referenced herein above on October 12, 2000 in port in Yemen, which bombing resulted in the wrongful deaths of the plaintiffs' decedents. The provision of material support or resources was engaged in by officials, employees and agents of the Republic of the Sudan while such officials, employees or agents were acting within the scope of their office, employment or agency.

27. The bombing of the U.S.S. Cole was an act of international terrorism knowingly and deliberately aided and abetted by Defendant Republic of the Sudan. The providing to Osama bin Ladin of safe harbor and shelter during a period of time up to and including 1996 and to other members of Al Qaeda through 2001, created liability, on the part of Defendant Republic of the Sudan. Defendant Republic of the Sudan provided material support and resources to some of the actual perpetrators of the bombing of the U.S.S. Cole. The Republic of Sudan aided and abetted the actual perpetrators in carrying out such acts of terrorism. Agents, servants or employees of the Republic of the Sudan knew that the acts of Osama bin Ladin were acts of terrorism designed to cause death or serious injury to the victims of its terrorism. Agents, servants or employees of the Republic of the Sudan participated in the providing of the shelter to Osama bin Ladin and to Al-Qaeda, the perpetrators of the acts complained of herein. Among the acts providing support or resources were the following: (a) the Gum Arabic Company, Ltd, a company operating in the Republic of Sudan was jointly owned by the government of Sudan and Osama bin Ladin; (b) use of a diplomatic pouch to send explosive materials belonging to Osama bin Ladin for Al Qaeda outside the Republic of Sudan; (c) the establishment of a bank primarily financed by Osama bin Ladin, the al-Shamal Islamic Bank in Khartoum, which bank is jointly owned by the Republic of the Sudan;

(d) Omar Hassan Ahmad al Bashir, president of the Republic of Sudan, authorized the entry into the Republic of Sudan by Al Qaeda operatives and gave Al Qaeda special authority to avoid paying taxes and duties ordinarily due to the Republic of the Sudan; (e) Osama bin Ladin founded Wadi-al-Aqiq, a trading company which was allowed unrestricted shipping by the Sudanese government; (f) the Sudanese government allowed Osama bin Ladin and Al Qaeda to operate training camps within the Republic of Sudan for the purpose of training terrorists including training such people in how to manufacture bombs and explosives; (g) the Republic of Sudan failed to comply with UN Security Council Resolutions 1044, 1054 and 1096, which were passed in 1996, and as of April, 2000 continued to harbor various terrorist groups including but not limited to Al Qaeda; (h) the Sudanese government allowed Al Qaeda operative Jamal Ahmed al-Fadl to ship four crates of explosive from Sudan to Yemen, the site of the bombing of the USS Cole; (i) Defendant Republic of the Sudan . . . sent its minister of foreign affairs, Mustafa Osman Ismail in May 2003 to the United States to issue a public apology for the prior harboring and assisting of terrorists including but not limited to Al Qaeda and Osama bin Ladin, which apology was aired on CSPAN. . . .

29. The attack on October 12, 2000 against the U.S.S. Cole while in a harbor in the waters of Yemen was part of a decade-long plan of

> international terrorism directed at the United States of America and its citizens that was conceived and implemented pursuant to an international conspiracy of terrorists, usually referred to as Al Qaeda, which conspiracy was joined and supported by Defendant Republic of the Sudan. Al Qaeda could not have existed or planned its acts of terrorism, including an act directed at an American Naval vessel, without the support of state sponsors of terrorism including Defendant Republic of the Sudan. Between 1991 and 1996 Defendant Republic of the Sudan provided shelter and a safe haven for the operations of Al Qaeda's leader, Osama bin Ladin. After 1996, Defendant continued to render support and shelter [to] other Al-Qaeda operatives including Yemeni militant terrorists who planned the attack on the U.S.S. Cole.
>
> 30. Commencing in 1991, Osama bin Ladin and his Al Qaeda organization were welcomed in the Republic of the Sudan by the leader of the National Islamic Front Haza al Turabi and the President of the Republic of the Sudan, Omar Bashir, who provided entry to and departure from the Republic of the Sudan for members of Al Qaeda without the normal customs inspections and payment of fees to which all other persons were subjected.

Id. ¶¶ 26, 27, 29, 30. Sudan argues that these allegations do not satisfy the three jurisdictional requirements of § 1605(a)(7) listed above. We therefore turn to a consideration of each.

A. The sufficiency of Plaintiffs' allegations of "material support or resources" by a state sponsor of terrorism[4]

Sudan argues that Plaintiffs' allegations of "material support or resources" under § 1605(a)(7) do not meet the statutory definition of that term. Under § 1605(a)(7),

> the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . ., and transportation.

18 U.S.C.A. § 2339A(b)(1) (West Supp. 2006); *see* § 1605(a)(7) (incorporating the definition of "material support or resources" from 18 U.S.C. § 2339A(b)(1)). Plaintiffs may therefore satisfy the first requirement of § 1605(a)(7) by identifying conduct by Sudan that falls within the meaning of any one of these listed forms of material support. Because § 2339A(b)(1) does not define the forms of material support that are relevant in this case, we will construe each in accord with its ordinary or natural meaning. *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993). In doing so, however, we also bear in mind the need to interpret statutory language in a manner that effectuates congressional intent. *See United Hosp. Ctr., Inc. v. Richardson*, 757 F.2d 1445, 1453 (4th Cir. 1985). With these

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[4] The United States has designated Sudan a state sponsor of terrorism. 58 Fed. Reg. 52523-01 (Oct. 8, 1993).

principles in mind, we consider various forms of material support referenced in § 2339A(b)(1).

Sudan focused much of its argument on the parameters of the term "safehouses." As we have set forth above, Plaintiffs allege that Sudan provided Al-Qaeda safe haven and a base of operations from which to conduct its terrorist operations. Am. Compl. ¶ 27(a), (c), (d), (e), (f) (alleging that Sudan allowed entry of Al-Qaeda operatives into Sudan; provided financial support to Al-Qaeda in the form of joint business ventures and relief from taxes and duties; and allowed Al-Qaeda to operate terrorist training camps in Sudan). Sudan argues that these allegations are not sufficient to state material support under the "safehouses" provision because the term should be limited to discrete buildings or structures. We disagree.

The term "safehouse" is normally defined as a "place where one may engage in secret activities or take refuge." Webster's Ninth New Collegiate Dictionary 1036 (1986). While one could certainly read the type of spatial limitations that Sudan advocates into this definition, we discern nothing inherent in the normal meaning of the term that necessarily warrants those limitations. Rather, it is entirely consistent with this definition to construe the statutory term to include the making available of locations within a country that serve as a base of operations for terrorists.

The underlying purpose of § 1605(a)(7), which guides our analysis, supports the more expansive construction of the term. Congress adopted § 1605(a)(7) to "give American citizens an important economic and financial weapon against" state sponsors of terrorism by "allowing suits . . . against countries responsible for terrorist acts where Americans . . . suffer injury or death." H.R. Rep. No. 104-518, at 62 (1995) (Conf. Rep.). Congress based this expansion of jurisdiction on

its recognition that state sponsors of terrorism "have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, . . . and the like." *Id.* Thus, the ordinary meaning of the term "safehouses" does not require, nor does the legislative history underlying the statute support, the restrictive interpretation of the term for which Sudan argues.

Moreover, the only other court to have construed comprehensively the scope of the term "safehouses" reached a similar conclusion. In rejecting a nearly identical argument by Sudan in an action for damages arising out of Al-Qaeda's 1998 bombings of the U.S. embassies in Kenya and Tanzania, the district court for the District of Columbia held that "[i]nsofar as the government of the Republic of Sudan affirmatively allowed and/or encouraged al-Qaeda and Hizbollah to operate their terrorist enterprises within its borders, and thus provided a base of operations for the planning and execution of terrorist attacks . . . Sudan provided a 'safehouse' within the meaning of 18 U.S.C. § 2339A, as incorporated in 28 U.S.C. § 1605(a)(7)." *Owens*, 412 F. Supp. 2d at 108. Similarly, here, allegations that Sudan provided Al-Qaeda with locations within the country where its members could meet, engage in business activities and operate terrorist training camps satisfy the "safehouses" provision of § 2339A(b)(1) for purposes of meeting the jurisdictional requirements of § 1605(a)(7).

In addition, Plaintiffs' allegations meet the "financial services" and "transportation" elements of the definition of material support as well. As explained above, we will construe each in accordance with its ordinary meaning. *See Smith*, 508 U.S. at 228.

The term "financial services" normally means the function of providing a service relating to finance or financiers. Webster's Ninth New Collegiate Dictionary 463, 1076 (definitions of financial and service). Plaintiffs meet this definition by alleging that Sudan formed a trading company and a bank with Al-Qaeda, and that it granted members of Al-Qaeda special tax and customs allowances. Each of these actions on the part of Sudan provided services of a financial nature to Al-Qaeda. Am. Compl. ¶ 27(a), (c), (d).

The term "transportation" commonly means "an act, process, or instance" of conveying "passengers or goods" from one place to another. Webster's Ninth New Collegiate Dictionary 1254. Plaintiffs meet this definition by alleging that Sudan allowed Al-Qaeda to use its diplomatic pouch, authorized entry of members of Al-Qaeda into the country, allowed a company run by Osama bin Laden unrestricted shipping, and allowed a member of Al-Qaeda to ship explosives to Yemen. Am. Compl. ¶ 27(b), (d), (e) and (f). Each of these alleged actions involve Sudan's exercise of control over the movement of passengers or goods from one place to another.

At bottom, Plaintiffs' allegations meet numerous elements of the definition of material support set out in § 2339A(b)(1) and incorporated into § 1605(a)(7). We therefore conclude that there is no basis to dismiss the Amended Complaint on the ground that Plaintiffs' allegations failed to satisfy the jurisdictional requirement of material support.

B. The sufficiency of Plaintiffs' allegations of the provision of material support by an official, employee or agent of Sudan while acting within the scope of his or her governmental authority

Sudan further argues that Plaintiffs failed to allege that a Sudanese official acting within the scope of his or her governmental authority provided the alleged material support, as required by § 1605(a)(7). Again, we disagree.

Plaintiffs easily satisfy this requirement with their allegation that "Omar Hassan Ahmad al Bashir, *president of the Republic of Sudan*, authorized the entry into the Republic of Sudan by Al-Qaeda operatives and gave Al-Qaeda special authority to avoid paying taxes and duties ordinarily due to" Sudan. Am. Compl. ¶ 27(d) (emphasis added). At times relevant to these proceedings, President Bashir was "an official, employee, or agent" of Sudan by virtue of his elected position and the broad governmental authority he wielded under the constitution of Sudan in force at the time. *See generally* Constitution of the Republic of Sudan (repealed 2005), available at http://www.sudan.net/government/constitution/english.html.

Moreover, President Bashir's alleged actions fell "within the scope of his . . . office, employment, or agency" because each involved the exercise of the governmental authority vested in the office of president by Sudan's constitution. As noted above, Plaintiffs allege that President Bashir authorized the entry of Al-Qaeda operatives into Sudan and granted those operatives special tax considerations. Am. Compl. ¶ 27(d). The authority to control both immigration and taxation in Sudan were constitutionally allocated to the federal government. Constitution of the Republic of Sudan arts. 110(c), 110(j), 113(b) (repealed 2005). The power of the

federal government under that document was exercised by the President of Sudan, along with a Council of Ministers who were appointed by the President. Constitution of the Republic of Sudan arts. 42, 47, 49 (repealed 2005). Based on this governmental structure and allocation of power, we conclude that President Bashir's alleged actions were within the scope of his office and, therefore, that the actions set forth in the Amended Complaint satisfy § 1605(a)(7)'s requirement that Plaintiffs allege the provision of material support by an official of the government acting within the scope of his authority.[5]

C. The sufficiency of Plaintiffs' allegations of jurisdictional causation

Sudan argues that Plaintiffs failed to allege sufficient facts to draw a causal connection, for pleading purposes, between the alleged provision of material support to Al-Qaeda and the deaths caused by the bombing of the U.S.S. Cole. For the reasons that follow, we must reject this argument as well.

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[5] Although we focus here on the actions of the president in the exercise of his specific authority, we note as well that other aspects of providing safe haven to Al-Qaeda also necessarily involved official governmental support. For example, as the district court recognized, permitting the use of diplomatic pouches, granting relief from taxes and duties, allowing the establishment and operation of terrorist training camps, and establishing financial joint ventures between Sudan and Al-Qaeda, Am. Compl. ¶ 27(a)-(i), could only be carried out by government officials acting within the scope of their offices. *See Rux v. Republic of Sudan*, 2005 U.S. Dist. LEXIS 36575, No. 2: 04-CV-428, 2005 WL 2086202 (E.D. Va. Aug. 26, 2005) (unpublished).

Section 1605(a)(7) strips a foreign state of its sovereign immunity only where damages are sought for an injury "that was *caused by* . . . the provision of material support or resources [for certain acts of terrorism]." § 1605(a)(7) (emphasis added). Courts have interpreted this statutory language to create a "jurisdictional causation" requirement that a plaintiff must meet to overcome a sovereign immunity-based challenge to subject matter jurisdiction under § 1605(a)(7). *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 363 U.S. App. D.C. 87, 376 F.3d 1123, 1129 (D.C. Cir. 2004); *Owens*, 412 F. Supp. at 109-10.

Jurisdictional causation under § 1605(a)(7) is distinct from the substantive causation element of a claim. *See Kilburn*, 376 F.3d at 1129. Our decision today reaches only the type of causation that § 1605(a)(7) requires to overcome foreign sovereign immunity and establish subject matter jurisdiction over an action against a foreign state. "To succeed in the end, the plaintiff[s] must go beyond jurisdiction and provide proof [of causation that] satisf[ies] a substantive cause of action." *Id.* That a plaintiff must ultimately establish substantive causation addresses any lingering concerns that a foreign state could be exposed to damages for remote or attenuated acts of support. *Id.*

Sudan argues that Plaintiffs' allegations do not satisfy jurisdictional causation because they contain factual gaps that break the causal chain between Sudan's support of Al-Qaeda and the bombing of the U.S.S. Cole. Sudan appears to advocate the same but-for standard for jurisdictional causation that the D.C. Circuit confronted in *Kilburn*, discussed below. *See id.* at 1127-29. (rejecting Libya's argument that § 1605(a)(7) requires allegations that the acts of terrorism would not have occurred without its support). In practical terms, Sudan's position would require a plaintiff to plead

sufficient facts to chart a direct and unbroken causal line between a state's provision of material support and an ultimate act of terrorism. However, neither the text of the statute nor relevant authority warrants adoption of such a stringent standard for purposes of surviving a motion to dismiss.

In *Kilburn*, the D.C. Circuit interpreted the "caused by" language of § 1605(a)(7) to require only a showing of proximate cause. 376 F.3d at 1128. Proximate cause is normally satisfied where there is a "reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." W. Keeton et al., Prosser & Keeton on the Law of Torts 263 (5th ed. 1984). The D.C. Circuit based its conclusion on the Supreme Court's interpretation of identical jurisdictional language in the Extension of Admiralty Jurisdiction Act ("Extension Act"), 46 U.S.C.A. app. § 740 (West 1975 & Supp. 2006).[6] *Kilburn*, 376 F.3d at 1128 (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-38, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995)). In construing the Extension Act in *Grubart*, the Supreme Court rejected an attempt to require close temporal and spatial proximity between a harm and the action that allegedly caused it. *Grubart*, 513 U.S. at 536. Instead, the Court held that the concept of proximate cause provided the proper measure for jurisdictional causation. In *Kilburn*, the D.C. Circuit applied *Grubart's* analysis to reject the defendant's attempt to subject

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[6] The relevant text of the Extension Act states: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by* a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. app. § 740 (emphasis added).

jurisdictional causation under § 1605(a)(7) to a but-for standard. *Kilburn*, 376 F.3d at 1129-30.

Guided by these decisions, we agree that proximate cause is the appropriate standard to apply at this juncture. It serves simultaneously to weed out the most insubstantial cases without posing too high a hurdle to surmount at a threshold stage of the litigation. We find nothing in the relevant authority nor in the text of § 1605(a)(7) to support Sudan's call for a more stringent standard. *See Kilburn*, 376 F.3d at 1128. Instead, Plaintiffs must establish jurisdictional causation by alleging facts sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damage arising out of a terrorist attack. *See Kilburn*, 376 F.3d at 1128; *Owens*, 412 F. Supp. 2d at 111.

Plaintiffs' allegations satisfy this standard. As set forth above, Plaintiffs make both general and specific allegations regarding Sudan's involvement in the bombing. Am. Compl. ¶¶ 26, 27, 29, 30. Plaintiffs first make general allegations that Sudan "aided and abetted" the bombing with knowledge that Al-Qaeda had designed the attack to cause death or serious injury. *Id.* Plaintiffs then detail specific allegations that Sudan allowed Al-Qaeda to use its diplomatic pouch to ship explosives, allowed Al-Qaeda operatives to enter the country; granted Al-Qaeda relief from taxes, allowed Al-Qaeda to operate terrorist training camps in the country that provided instruction on the use of explosives, and allowed an Al-Qaeda operative to ship explosives from Sudan to Yemen, the site of the bombing. *Id.* ¶ 27(b), (d), (f), (h).

Plaintiffs' allegations are somewhat imprecise as to the temporal proximity of Sudan's actions to and their causal connection with the bombing of the U.S.S. Cole. Although

the allegations describe actions on the part of Sudan that could have supported and facilitated the bombing, they do not chart a direct and unbroken factual line between Sudan's actions and the bombing. However, such imprecision is not fatal for purposes of jurisdictional causation so long as the allegations, and the reasonable inferences drawn therefrom, demonstrate a reasonable connection between Sudan's actions and the bombing. *See Kilburn*, 376 F.3d at 1128; *Owens*, 412 F. Supp. 2d at 111. The allegations do so here by describing how Sudan provided Al-Qaeda a base of operations to plan and prepare for the bombing, and provided operational support for the attack. Accordingly, we find no merit in Sudan's contention that Plaintiffs failed to allege sufficient facts to support the jurisdictional causation element of § 1605(a)(7).

In summary, we find that Plaintiffs alleged sufficient facts to create subject matter jurisdiction under § 1605(a)(7) and, therefore, find no error in the district court's denial of Sudan's motion to dismiss for lack of subject matter jurisdiction.

III.

Sudan next asks this court to exercise pendent appellate jurisdiction over the district court's denial of its motion to dismiss for lack of personal jurisdiction, which is a non-final order that is not otherwise immediately appealable. Sudan argues that we should do so to promote the efficient use of judicial resources by foregoing the litigation that would potentially result from delaying review of this issue until after final judgment is entered in the district court. We must decline to exercise such jurisdiction, however.

It borders on the axiomatic that, subject to certain limited exceptions, our appellate jurisdiction is limited to final orders from the district courts. 28 U.S.C. § 1291 (2000). The district court's order denying Sudan's motion to dismiss for lack of personal jurisdiction is not a final order because it does not "end[]the litigation on the merits and leave[]nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Nor does it fall within the category of non-final orders that are immediately appealable under the collateral-order doctrine because they are "conclusive, . . . resolve important questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)).[7] There is nothing that would prevent effective review of the denial of a motion to dismiss for lack of personal jurisdiction following final judgment in the district court. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 381 n.1 (5th Cir. 1999).

Sudan nevertheless argues that we should review this issue under pendent appellate jurisdiction, a judicially-created, discretionary exception to the final judgment requirement. Under this exception, we retain the discretion to review issues

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[7] Non-final orders are also immediately appealable in other limited circumstances. *See* 28 U.S.C. §§ 1292(a) & (b) (2000); Fed. R. Civ. P. 54(b). Having carefully reviewed the record, we conclude that neither the facts nor procedural history of this case implicate any of these exceptions.

that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review. *See Taylor*, 81 F.3d at 437. Pendent appellate jurisdiction is an exception of limited and narrow application driven by considerations of need, rather than of efficiency. *See Montano v. City of Chicago*, 375 F.3d 593, 599 (7th Cir. 2004); *Taylor*, 81 F.3d at 437. In *Swint*, the Supreme Court suggested that pendent appellate jurisdiction is available only (1) when an issue is "inextricably intertwined" with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is "necessary to ensure meaningful review" of an immediately appealable issue. *Swint*, 514 U.S. at 50-51.

Sudan relies on a line of authority from the District of Columbia Circuit that suggested that the exercise of pendent appellate jurisdiction is appropriate based on "considerations of fairness or efficiency." *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 318 U.S. App. D.C. 109, 85 F.3d 675, 679 (D.C. Cir. 1996); *see also Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 325 U.S. App. D.C. 117, 115 F.3d 1020, 1026 (D.C. Cir. 1997). However, the Supreme Court appears to have foreclosed such considerations in *Swint*. The Court there rejected an efficiency argument similar to Sudan's by reasoning that such arguments "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings." *Swint*, 514 U.S. at 45.

Moreover, since *Swint*, this court has consistently limited its application of pendent appellate jurisdiction to the two circumstances outlined therein. *See, e.g. United States v. Bundy*, 392 F.3d 641, 649 (4th Cir. 2004); *Altman v. City of High Point*, 330 F.3d 194, 207 n. 10 (4th Cir. 2003); *Antrican v. Odom*, 290 F.3d 178, 191 (4th Cir. 2002); *Hinson*

v. Norwest Fin. S. C., Inc., 239 F.3d 611, 615 (4th Cir. 2001); *United States v. North Carolina*, 180 F.3d 574, 581 n.4 (4th Cir. 1999); *Jenkins v. Medford*, 119 F.3d 1156, 1159 n.2 (4th Cir. 1997) (en banc); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996). The First through Eleventh Circuits have similarly limited their application of pendent appellate jurisdiction. *See Kilburn*, 376 F.3d at 1134 n.7 (collecting cases).

We are constrained by the language of the Supreme Court as well as our own precedent from recognizing efficiency considerations as a basis for the exercise of pendent appellate jurisdiction. Because Sudan has not argued that jurisdiction is proper under either element of *Swint*, we decline to review the denial of its motion to dismiss for lack of personal jurisdiction and dismiss that portion of its appeal.

IV.

Sudan next argues that we should exercise pendent appellate jurisdiction over its claim that Plaintiffs lack standing based on the Death on the High Seas Act ("DOHSA"), 46 U.S.C. app. §§ 761-767 (West 1975 & Supp. 2006).[8] Sudan argues that resolution of this standing issue is necessary to ensure meaningful review of the issue of subject matter jurisdiction because "[i]f Plaintiffs have no standing to bring the claims asserted, the Court's decision on the FSIA issue will be an advisory opinion." Appellant's Br.

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[8] This issue is not otherwise immediately appealable because the order being appealed neither terminated this action nor resolved Sudan's standing argument. *See* § 1291; *Swint*, 514 U.S. at 42 (recognizing that a decision must conclusively resolve an issue for the collateral order doctrine to apply).

at 5. Even if we were inclined to consider an issue taken under advisement and not ruled on by the district court, we find no basis to exercise jurisdiction over this issue.

The standing issue and the FSIA issue are not sufficiently interconnected to justify pendent appellate jurisdiction. Under the elements of *Swint*, jurisdiction is appropriate where issues are (1) "so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal or [(2)] resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000) (citations omitted); *see also Berrey v. Asarco, Inc.*, 439 F.3d 636, 647 (10th Cir. 2006). Neither situation exists here. Resolution of Sudan's FSIA argument neither required us first to decide nor necessarily decides the issue of standing under DOHSA. In fact, our analysis of the FSIA issue did not address, or even refer to, the issue of standing. Each issue involves a distinct legal concept that does not affect analysis of the other. Accordingly, we find no basis to exercise pendent appellate jurisdiction over the issue of standing.

Contrary to Sudan's argument, our decision not to exercise jurisdiction over this issue does not threaten to render our ruling on the FSIA issue advisory. We would issue an advisory opinion were we to pass "judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S. Ct. 547, 5 L. Ed. 2d 476 (1961). No such danger exists here. We have decided the issue of subject matter jurisdiction based on a concrete set of facts in the context of a live

controversy between the parties. The fact that Plaintiffs' case might eventually succumb to a dispositive defect, such as lack of standing, does not alter the concrete nature of the dispute before us today or the propriety of our ruling.

Because no basis exists to exercise jurisdiction over Sudan's standing argument, we decline review and dismiss that portion of its appeal.

V.

Although the issue is presented obliquely in its brief, Sudan seeks appellate review of the district court's ruling that venue for this action was proper in the Eastern District of Virginia. An order denying a motion to dismiss for improper venue, however, is interlocutory and not immediately appealable. *La. Ice Cream Distribs., Inc. v. Carvel Corp.*, 821 F.2d 1031, 1033 (5th Cir. 1987). Therefore, we lack appellate jurisdiction over this issue. Sudan does not argue that we should exercise pendent appellate jurisdiction over this issue and we discern no reason to do so. Therefore, we decline to exercise jurisdiction to review the district court's order regarding venue and dismiss that portion of Sudan's appeal.

VI.

In light of the foregoing, we affirm the district court's denial of Sudan's motion to dismiss for lack of subject matter jurisdiction and dismiss the remainder of Sudan's appeal for lack of appellate jurisdiction.

AFFIRMED IN PART AND DISMISSED IN PART

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 2:04cv428

[Filed August 26, 2005]

OLIVIA RUX, et al.,	)
Plaintiff,	)
	)
v.	)
	)
THE REPUBLIC OF SUDAN,	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Now before the Court is Defendant Republic of Sudan's Motion to Dismiss Plaintiffs" Amended Complaint with Prejudice ("Motion to Dismiss"). (Doc. No. 41.) The Motion urges dismissal on six of the seven grounds available under Rule 12(b) of the Federal Rules of Civil Procedure: 1) lack of jurisdiction over the subject matter, 2) lack of jurisdiction over the person, 3) improper venue, 4) insufficiency of process, 5) insufficiency of service of process, and 6) failure to state a claim upon which relief can be granted. For the reasons that follow, the Motion to Dismiss is **DENIED** on

grounds 1, 2, 3, 4, and 5.[1] The Motion to Dismiss on ground 6, failure to state a claim upon which relief can be granted, is **TAKEN UNDER ADVISEMENT** until sometime after the Republic of Sudan answers the Complaint.

Also before the Court is Defendant Republic of Sudan's Motion to Amend the Court's Order of July 19, 2005, to Extend the Date for Filing Defendant's Answer to Plaintiffs' Amended Complaint ("Motion to Extend"). (Doc. No. 43.) The Motion to Extend prays this Court postpone the September 2, 2005 deadline to answer the Complaint, established by Order of this Court on July 19, 2005 (Doc. No. 39 at 3, ¶ 5) until ten days after the issuance of this Memorandum Opinion and Order. Plaintiffs do not oppose the Motion to Extend. For the reasons that follow, the Motion to Extend is **GRANTED,** subject to the conditions explained below.

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[1] Grounds 2, 4, and 5, involving personal jurisdiction and sufficiency of process and service of process, were addressed and resolved at the June 30, 2005 hearing on Defendant's Motion to Vacate Entry of Default and Cancel Evidentiary Hearing. (Minute Order of June 30, 2005, Doc. No. 35.) *See infra* Parts I.B. and III.A and B. Defendant has reasserted those grounds in this Motion to Dismiss in spite of the Court's prior ruling. (Def.'s Memo. in Supp. of Mot. at 1, n.2, Doc. No. 42.) This Memorandum Opinion and Order, in addition to resolving Sudan's subject matter jurisdiction attack and other issues, memorializes the reasons underlying the Court's prior ruling on personal jurisdiction and sufficiency of process and service of process.

I. BACKGROUND

A. The Complaint

On October 12, 2000, the USS Cole, an American warship home ported in Norfolk, Virginia and temporarily berthed at port in Aden, Yemen, was bombed by Al-Qaeda, a global terrorist organization. Seventeen American sailors stationed aboard the Cole were killed as a result of the bombing. More than fifty surviving family members of the deceased sailors (collectively the "Plaintiffs")[2] brought suit in this Court on July 16, 2004 to recover damages allegedly arising from the sailors' deaths. Plaintiffs' core factual allegation[3] is that the Defendant, the Republic of Sudan ("Sudan"), "provided material support in the form of funding, direction, training and cover to Al-Qaeda, a worldwide terrorist organization whose operatives facilitated the planning and execution of the bombing of the USS Cole." (Am. Compl. at 2, Doc. No. 10.)

Though foreign states are ordinarily entitled to immunity from suit in United States courts, Plaintiffs allege that Sudan's

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[2] The Plaintiff-family members include widows, minor children, siblings, and parents. In addition, one "long-term companion" and mother of the child of a decedent is also named as a plaintiff. (Am. Compl. ¶ 10, Doc. No. 10.) Originally, family members of just seven of the deceased sailors joined in this lawsuit. Through four subsequent amendments to the Complaint, family members of all seventeen deceased sailors have been added as plaintiffs.

[3] The facts alleged in Plaintiffs' Complaint are taken as true for the purpose of resolving the Motions presented to the Court. *See infra* Part II.A. This Memorandum Opinion and Order contains no findings of fact.

actions resulted in a statutory waiver of sovereign immunity pursuant to the "terrorist exception" contained in the Foreign Sovereign Immunities Act ("FSIA"). *See* 28 U.S.C. § 1605(a)(7). Plaintiffs allege that they are entitled to relief under 1) state common law or statutory law for wrongful death for the State of residence for each victim killed in the bombing of the USS Cole; 2) state common law or statutory law for intentional infliction of mental or emotional distress for each Plaintiff; 3) state common law or statutory law for battery for each Plaintiffs' decedent; 4) federal common law for loss of solatium for each Plaintiff as set forth in *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260 (D.D.C. 2002); and, 5) the Restatement (Second) of Torts § 46(2). (Proposed Am. to Supp. Am. Compl. at 2, Pt. VI, Doc. No. 28.) Plaintiffs contend that they are entitled to damages for loss of solatium or consortium, loss of love, affection, companionship, advice, and comfort as a consequence of wrongful death (Am. Compl. ¶ 32, Doc. No. 10), and for loss of support due to the loss of earnings and earning capacity. (Proposed Am. to Supp. Am. Compl. at 2, Pt. II, Doc. No. 28.) They seek millions of dollars in alleged damages.

B. Procedural History

This lawsuit was initiated on July 16, 2004. Four amendments have been made to the original Complaint (collectively referred to as "the Complaint"). (*See* Court Order of June 15, 2005 at 1, Doc. No. 27; *see also* Amendment Filings and Orders, Doc. Nos. 8, 10, 11, 12, 14, 15, 16, 22, 25, 28.) Service of process was made on the Republic of Sudan on December 16, 2004. (Doc. No. 17.) As of more than 60 days after service of process, Sudan had not appeared to defend the suit. Consequently, the Clerk of the Court noted Sudan's default in the record on February 16,

2005. (Doc. No. 18.) *See* 28 U.S.C. § 1608(d); Fed. R. Civ. P. 55(b)(1). Soon thereafter, on February 25, 2005, Plaintiffs moved the Court to enter a default judgment. (Doc. No. 20.) *See* 28 U.S.C. § 1608(e); Fed. R. Civ. P. 55(b)(2). This Court conducted a telephonic status conference with counsel for Plaintiffs on March 16, 2005, at which time a default judgment hearing was scheduled for August 23, 2005 and Plaintiffs were ordered to submit a memorandum of law concerning the appropriate burden of production and proof on liability and damages in cases involving a foreign sovereign in default.[4] In spite of Sudan's default, the Court also directed Plaintiffs to provide Sudan with notice of any depositions they intended to take. *See* Fed. R. Civ. P. 30; E.D. Va. Local R. Civ. P. 30(h). Subsequently, on June 15, 2005, upon Plaintiffs' (Revised) Motion for Leave to Supplement Amended Complaint (Doc. No. 25), this Court entered an Order granting leave to amend subject to proper service of process. (Doc. No. 27.) The Court also directed Plaintiffs to prepare a final pretrial order, in accordance with local practice, in advance of the default judgment hearing (then) scheduled for August 23, 2005. (Id.) Each of these steps was taken to safeguard the rights of the (then) defaulted party, Sudan. *See* E.D. Local R. Civ. P. 16(A).

On June 17, 2005, the Republic of Sudan entered a general appearance by filing a Motion to Vacate Entry of Default and Cancel Evidentiary Hearing ("Motion to Vacate

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[4] The Court took this step in light of conflicting caselaw concerning the burden of production and proof in the default context in cases brought pursuant to the FSIA. *Contrast Cronin v. Islamic Republic of Iran*, 238 F. Supp.2d 222, 224 (D.D.C. 2002) *with Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp.2d 217, 223 (S.D.N.Y. 2003); also compare 28 U.S.C. § 1608(e) with Fed. R. Civ. P. 55(e).

Default"), which "respectfully move[d] the Court for an Order vacating the Entry of Default and Canceling the Evidentiary Hearing currently set for August 23, 2005 . . . ." (Doc. No. 29.) The Motion to Vacate Default was accompanied by a separate memorandum of law in support (Doc. No. 30) containing a personal jurisdiction plea alleging that the process and service of process utilized by Plaintiffs were insufficient. Critically, Sudan's personal jurisdiction plea was not raised in its initial motion paper.

A hearing was conducted on Sudan's Motion to Vacate Default on June 30, 2005. Before entertaining oral argument, the Court confirmed that counsel for Defendant, the law firm of Hunton & Williams, was authorized by Defendant to enter an appearance and that they would remain as counsel throughout the proceedings. The need to verify Hunton & Williams' authority to appear was prompted by developments in another civil action involving Sudan that is pending before the United States District Court for the District of Columbia. *See James Owens, et al v. Republic of Sudan, et al*, Civil Action No. 01-2244 (JDB). In *Owens*, Hunton & Williams moved to withdraw from representation on the grounds that Sudan failed to communicate adequately with counsel and refused to pay legal fees. (Pl.'s Memo. in Opp. to Def.'s Mot. to Vacate Default, Exh. 3, Doc. No. 32.) Prior to considering whether Sudan should be relieved from default, this Court was therefore compelled to ensure that Hunton & Williams possessed the requisite authority to act on Sudan's behalf and to confirm that counsel intended to participate in the case from beginning to end. As the Court explained to counsel at the hearing, in the Eastern District of Virginia, "[i]f you're here, you're here." (Tr. of Hrg. at 5, Doc. No. 36.) *See* E.D. Va. Local R. 83.1(G).

After making the necessary verification, the Court relieved Sudan from default. Plaintiffs did not object. (Tr. of Hrg. at 32.) Additionally, the Court addressed the personal jurisdiction plea raised by Sudan in its memorandum accompanying the Motion to Vacate Default. (*See id.* at 6-31.) Subject to the reasons stated in this Memorandum Opinion and Order,[5] the Court concluded that: "1) Defendant waived personal jurisdiction by entering an appearance to vacate default; 2) Plaintiffs' service of process was valid pursuant to the requirements of the Foreign Sovereign Immunities Act, Federal Rules of Civil Procedure, Virginia statute, and other reasons to follow in a written opinion." (Minute Order of June 30, 2005, Doc. No. 35.)

Finally, at the June 30, 2005 hearing, Sudan informed the Court and Plaintiffs that it intended to attack this Court's subject mater jurisdiction by raising a plea of sovereign immunity. (Tr. of Hrg. at 31-2, Doc. No. 36.) Due to the types of issues involved and the variety of ways in which subject matter jurisdiction may be challenged based on sovereign immunity,[6] the Court ordered the parties to submit

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[5] In addition to resolving the Motion now before the Court, this Memorandum Opinion and Order also explains the reasons for the Court's June 30, 2005 Minute Order. *See supra* note 1; *infra* Part III. A and B.

[6] "In order to preserve the full scope of [sovereign] immunity, the district court must make the 'critical preliminary determination' of its own jurisdiction as early in the litigation as possible; to defer the question is to 'frustrate the significance and benefit to immunity from suit.'" *Phoenix Consulting, Inc. v. Republic of Angola*, 342 U.S. App. D.C. 145, 216 F.3d 36, 39 (D.C. Cir. 2000). In fact, the initial inquiry is viewed as so important that "[o]rders denying sovereign immunity are immediately appealable collateral orders."

proposed scheduling orders for resolving this threshold jurisdictional question. (*Id.* at 32-49.) A telephonic status conference to establish a scheduling order was scheduled for July 19, 2005.

The parties submitted proposed scheduling orders to the Court in advance of the July 19, 2005 telephonic status conference. Importantly, Sudan represented to the Court that it intended to challenge subject matter jurisdiction as a matter of law, based only on the legal sufficiency of the factual allegations contained in the Complaint. (Tr. of Hrg. at 5-6, Doc. No. 40; Def.'s Memo. Regarding Procedures for Subj. Matter J. Challenge at 2, Doc. No. 37.) As resolution of such a challenge does not require consideration of any evidence outside the pleadings, *see infra* Part II.A., jurisdictional discovery was deemed unnecessary. Based on this, the Court concluded that the scheduling proposals submitted by both parties were unacceptable because they unnecessarily delayed resolution of the subject matter jurisdiction issue. (*Id.* at 3.) At that point in time, more than one year had elapsed since the filing of the Complaint and the case had progressed

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Eckert Intern., Inc. v. Gov't of Sovereign Democratic Republic of Fiji, 32 F.3d 77, 79 (4th Cir. 1994) (citations omitted). Furthermore, challenges to subject matter jurisdiction based on sovereign immunity can take either of two forms, one of which requires jurisdictional discovery, and one of which prohibits it. *See Phoenix Consulting*, 216 F.3d at 40. As a result of the nascent thicket presented by Sudan's anticipated sovereign immunity plea, the Court afforded the parties the opportunity to propose scheduling orders on how to approach the subject matter jurisdiction challenge before proceeding.

nowhere.[7] Thus, the Court entered its own scheduling order to ensure swift resolution of the threshold question of subject matter jurisdiction. (Court Order of July 19, 2005 at 2-3, Doc. No. 39.) The Court also entered a provisional scheduling order pursuant to Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure, conditioned, of course, on a finding that Sudan is not entitled to sovereign immunity. (*Id.* at 8.) *See also* E.D. Local R. Civ. P. 16(B).

On August 3, 2005, pursuant to this Court's Order of July 19, 2005, Sudan filed the Motion to Dismiss Plaintiff's Amended Complaint with Prejudice (the "Motion to Dismiss") (Doc. No. 41) now before the Court. The Motion raises six of the seven grounds for dismissal available in Rule 12(b) of the Federal Rules of Civil Procedure: 1) that the Court lacks subject matter jurisdiction because Sudan is immune from suit; 2) that Sudan lacks sufficient minimum contacts with the forum state to establish personal jurisdiction; 3) that the Eastern District of Virginia, Norfolk Division, is an improper venue; 4) that Plaintiffs' process is legally

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[7] The Eastern District of Virginia adheres strictly to the principle of "Justice Delayed, Justice Denied," which is etched into the face of the Albert V. Bryan federal courthouse in Alexandria, Virginia. Based on internal judicial management statistics, the average time between the filing of a case and its completion in 2004 was less than six months. For civil cases proceeding to trial during that year, the average time between filing and completion was approximately nine months. Moreover, in 2004 there were only thirteen cases that had been pending for more than three years in the entire Eastern District of Virginia. At more than one-year in duration, this case is presently the oldest active matter on the undersigned Judge's docket. *Cf. Safer Display Tech., Ltd. v. Tatung Co.*, 227 F.R.D. 435, 442 (E.D. Va. 2004) (Doumar, J.) (expressing this Court's intolerance of unnecessarily long jurisdictional forays).

insufficient; 5) that Plaintiffs' service of process is legally insufficient; and, 6) that Plaintiffs have failed to state a claim upon which relief can be granted because their claim is barred by the allegedly applicable limitations period, as well as for other reasons.[8]

Additionally, Sudan also filed a Motion to Amend the Court's Order of July 19, 2005, to Extend the Date for Filing Defendant's Answer to Plaintiff's Amended Complaint (the "Motion to Extend"). (Doc. No. 43.) The Motion to Extend requests that the Court grant Sudan ten days after issuance of this Memorandum Opinion and Order to answer the Complaint, rather than enforce the date of September 2, 2005 established by the July 19, 2005 Scheduling Order. (Doc. No. 39 at 3, ¶ 5.) Plaintiffs do not oppose this Motion.

The Court entertained oral argument on August 23, 2005 on both pending Motions, which are accordingly ripe for judicial resolution.

II. SUBJECT MATTER JURISDICTION

The Republic of Sudan contends that it is entitled to sovereign immunity and that, as a result, this Court lacks subjection matter jurisdiction pursuant to the requirements imposed by the FSIA. Sudan's subject matter jurisdiction challenge is strictly legal in nature: accepting the facts alleged in the Complaint as true, Sudan argues that Plaintiffs have failed to establish the requisite elements of subject matter jurisdiction.

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[8] *See supra* note 1.

A. Legal Standard

It goes without saying that a federal district court is "obliged to dismiss a case whenever it appears the court lacks subject matter jurisdiction." *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999); *see also Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 299 (4th Cir. 2000); Fed. R. Civ. P. 12(h)(3). Indeed, the "'nature and limits of the judicial power of the United States'" require that federal jurisdiction be established at the outset, or as near to the outset as possible, of any case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)). A threshold jurisdictional inquiry is of special importance where foreign sovereign immunity is involved: "In order to preserve the full scope of that immunity, the district court must make the 'critical preliminary determination' of its own jurisdiction as early in the litigation as possible; to defer the question is to 'frustrate the significance and benefit to immunity from suit.'" *Phoenix Consulting, Inc. v. Republic of Angola*, 342 U.S. App. D.C. 145, 216 F.3d 36, 39 (D.C. Cir. 2000) (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 284 U.S. App. D.C. 333, 905 F.2d 438, 449 (D.C. Cir. 1990)); *see also Velasco v. The Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). In fact, the threshold jurisdictional determination in FSIA cases has been deemed so important as to warrant interlocutory appellate review under the collateral order review doctrine. *Eckert Intern., Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994) (citations omitted); *see also supra* note 6.

Challenges to subject matter jurisdiction under the FSIA may take one of two forms. "The defendant may challenge either the legal sufficiency or the factual underpinning of an

exception, and how the district court proceeds to resolve [the challenge] depends upon whether the motion presents a factual challenge." *Phoenix Consulting*, 216 F.3d at 40. In this case, the Republic of Sudan has challenged only the legal sufficiency of Plaintiffs' jurisdictional allegations, claiming that the factual allegations in the Complaint, even if true, do not permit a waiver of sovereign immunity. The sufficiency of the factual allegations contained in a complaint is a question of law. Accordingly, "the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Id.* (citations omitted).[9] Just as with a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, "dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief." Price v. Socialist People's Libyan Arab Jamahiriya, 352 U.S. App. D.C. 284, 294 F.3d 82, 93 (D.C. Cir. 2002).

B. The Statutory Framework

1. The FSIA as a Jurisdictional Statute

The FSIA[10] provides that "[s]ubject to existing international agreements to which the United States is a party

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[9] While ordinarily a court may peer beyond the pleadings to assess whether it has jurisdiction over the subject matter, *see Velasco*, 370 F.3d at 398, a court is not authorized to do so upon a plea of sovereign immunity based only on the legal sufficiency of the allegations pled in the complaint. *See Phoenix Consulting*, 216 F.3d at 40; *cf. Foremost-McKesson*, 905 F.2d at 449.

[10] The Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, Oct. 21, 1976, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602-1611.

. . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Thus, a foreign state is immune from suit in American courts unless one of the nine exceptions to foreign sovereign immunity contained in §§ 1605 to 1607 of the FSIA apply.[11] In the event that one of the exceptions does apply, federal district courts have original jurisdiction over the subject matter. *Id.* § 1330(a).[12] Sections 1604 and 1330(a) of the FSIA thereby operate in tandem to "condition the subject matter jurisdiction of the federal and state courts upon the existence of one of the exceptions to immunity set forth in the FSIA." *Velasco*, 370 F.3d at 397. In that manner, "the FSIA provides the sole source of subject matter jurisdiction in suits against a foreign state." *Id.* (citing *Argentine Republic v.*

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[11] Prior to passage of the FSIA in 1976, foreign states were generally afforded sovereign immunity as "a matter of grace and comity on the part of the United States," but not due to "a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). Generally speaking, courts adopted a "restrictive theory" of foreign sovereign immunity, in which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487. The FSIA essentially codifies the restrictive theory. *Id.* at 488.

[12] Section 1330(a) of Title 28, United States Code, provides that:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605 - 1607 of this title or under any applicable international agreement.

Amerada Hess Shipping Corp., 488 U.S. 428, 434-39, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)). Accordingly, determining whether a foreign state-defendant is entitled to sovereign immunity is a jurisdictional inquiry. *See id.* at 397-98; *Cicippio-Puleo v. Islamic Republic of Iran*, 359 U.S. App. D.C. 299, 353 F.3d 1024, 1032 (D.C. Cir. 2004) (holding that 28 U.S.C. § 1605(a)(7), the terrorism exception, is a jurisdictional provision); *Phoenix Consulting*, 216 F.3d at 39.

2. The Terrorism Exception

The FSIA exception at issue in this case is the terrorist exception. The terrorist exception was enacted in 1996 as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The terrorist exception waives immunity of foreign states and their agents in any case

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in Section 2339A of Title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . .

28 U.S.C. § 1605(a)(7). For this exception to apply, the foreign state must be designated as a "state sponsor of terrorism" by the United States State Department, the foreign state must have been provided with a reasonable opportunity to arbitrate the claim if the alleged act or acts giving rise to the dispute occurred within the foreign state's territory, and

either the claimant or the victim must be a national of the United States at the time of the alleged act or acts. *Id.* §§ 1605(a)(7)(A) and (B)(i)-(ii).

3. Pleading Requirements

Plaintiffs' Complaint alleges that Sudan is not entitled to sovereign immunity under the "material support or resources" clause of the terrorist exception. Sudan, in turn, contends that the allegations contained in the Complaint, even if true, do not satisfy the jurisdictional requirements of this clause. Sudan's contention raises the question: what facts must be pled, and with what degree of specificity must they be pled, to invoke the material support and resources clause of the terrorist exception to foreign sovereign immunity? This is an issue of first impression within this judicial Circuit.

Since the FSIA is the sole source of subject matter jurisdiction over a foreign state, whether jurisdiction obtains depends on whether the express terms of the relevant statutory provision have been complied with. In other words, determining the pleading requirements for invoking the material support and resources clause of the terrorist exception is simply a matter of statutory interpretation. According to the plain terms of § 1605(a)(7), a plaintiff must plead five elements to invoke the material support or resources clause of the terrorist exception: 1) the occurrence of *personal injury* or *death*, 2) *caused by*, 3) the provision of *material support or resources* (as defined by 18 U.S.C. § 2339A), 4) by an *official, employee,* or *agent* of a foreign state, 5) while acting *within the scope* of his office, employment, or agency.

These are the five elements contained within the statute: nothing *less* and nothing *more* will satisfy the requirements of

§ 1605(a)(7). *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. [citation omitted]."); *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. [internal quotation marks omitted]."). While these elements must be pled for jurisdiction to obtain, "[a] claimant need not set out all of the precise facts on which the claim is based in order to survive a motion to dismiss." *Price*, 294 F.3d 82 at 93.

C. Discussion and Analysis

1. The Jurisdictional Allegations in the Complaint

Broadly, the Complaint alleges that Sudan "provided material support in the form of funding, direction, training and cover to Al-Qaeda, a worldwide terrorist organization whose operatives facilitated the planning and execution of the bombing of the USS Cole." (Am. Compl. at 2, Doc. No. 10.) More specifically, Plaintiffs allege the following:

> 26. Defendant Republic of Sudan, by and through officials, employees or agents acting knowingly and willfully, used funds and other assets belonging to the Republic of the Sudan to provide material support and resources to Osama bin Ladin and to Al-Qaeda, the perpetrators of the bombing of the USS Cole reference herein above on October 12, 200 in port in Yemen, which bombing resulted in the wrongful deaths of the plaintiffs' decedents. The provision of material support or resources was engaged in by officials, employees

and agents of the Republic of the Sudan while such officials, employees or agents were acting within the scope of their office, employment or agency.

27. The bombing of the USS Cole was an act of international terrorism knowingly and deliberately aided and abetted by Defendant Republic of the Sudan. The providing to Osama bin Ladin of safe harbor and shelter during a period of time up to and including 1996 and to other members of Al-Qaeda through 2001, created liability, on the part of Defendant Republic of the Sudan. Defendant Republic of the Sudan provided material support and resources to some of the actual perpetrators of the bombing of the USS Cole. The Republic of Sudan aided and abetted the actual perpetrators in carrying out such acts of terrorism. Agents, servants or employees of the Republic of the Sudan knew that the acts of Osama bin Ladin were acts of terrorism designed to cause death or serious injury to the victims of its terrorism. Agents, servants or employees of the Republic of the Sudan participated in the providing of the shelter to Osama bin Ladin and to Al-Qaeda, the perpetrators of the acts complained of herein. Among the acts providing support or resources were the following: (a) the Gum Arabic Company, Ltd, a company operating in the Republic of Sudan was jointly owned by the government of Sudan and Osama bin Ladin; (b) use of a diplomatic pouch to send explosive materials belonging to Osama bin Ladin for Al-Qaeda outside the Republic of Sudan; (c) the establishment of a bank primarily financed Osama bin Ladin, the al-Shamal Islamic Bank in

Khartoum, which bank is jointly owned by the Republic of the Sudan; (d) Omar Hassan Ahmad al Bashir, president of the Republic of Sudan, authorized the entry into the Republic of Sudan by Al-Qaeda operatives and gave Al-Qaeda special authority to avoid paying taxes and duties ordinarily due to the Republic of the Sudan; (e) Osama bin Ladin founded Wadi-al-Aqiq, a trading company which was allowed unrestricted shipping by the Sudanese government; (f) the Sudanese government allowed Osama bin Ladin and Al-Qaeda to operate training camps within the Republic of Sudan for the purpose of training terrorists including training such people in how to manufacture bombs and explosives; (g) the Republic of Sudan failed to comply with UN Security Council Resolutions 1044, 1054 and 1096, which were passed in 1996, and as of April, 2000 continued to harbor various terrorist groups including but not limited to Al-Qaeda; (h) the Sudanese government allowed Al-Qaeda operative Jamal Ahmed al-Fadl to ship four crates of explosive from Sudan to Yemen the site of the bombing of the USS Cole; (i) Defendant Republic of the Sudan has sent its minister of foreign affairs, Mustafa Osman Ismail in May 2003 to the United States to issue a public apology for the prior harboring and assisting of terrorists including but not limited to Al-Qaeda and Osama bin Ladin, which apology was aired on CSPAN.

. . .

29. The attack on October 12, 2000 against the USS Cole while in a harbor in the waters of Yemen was

> part of a decade-long plan of international terrorism directed at the United States of America and its citizens that was conceived and implemented pursuant to an international conspiracy of terrorists, usually referred to as Al-Qaeda, which conspiracy was joined and supported by Defendant Republic of the Sudan. Al-Qaeda could not have existed or planned its acts of terrorism, including an act directed at an American Naval vessel, without the support of state sponsors of terrorism including Defendant Republic of the Sudan. Between 1991 and 1996 Defendant Republic of the Sudan provided shelter and a safe haven for the operations of Al-Qaeda's leader, Osama bin Ladin. After 1996, Defendant continued to render support and shelter of other Al-Qaeda operatives including Yemeni militant terrorists who planned the attack on the USS Cole.
>
> 30. Commencing in 1991, Osama bin Ladin and his Al-Qaeda organization were welcomed in the Republic of the Sudan by the leader of the National Islamic Front Haza al Turabi and the President of the Republic of the Sudan, Omar Bashir, who provided entry to and departure from the Republic of the Sudan for members of Al-Qaeda without normal customs inspections and payment of fees to which all other persons were subjected.

(*Id.* ¶¶ 26, 27, 29, 30.)

Sudan contends that these allegations are insufficient to establish jurisdiction under § 1605(a)(7). Sudan's core contentions are that Plaintiffs failed to plead causation, failed

to plead that Sudan provided material support and resources with the requisite specificity, and failed to plead that the employees, agents, or officials of the Sudanese government who allegedly provided the material support and resources acted within the scope of their governmental position. Each argument is addressed *in seriatim*.

2. 'Caused By'

a) Proximate Cause vs. 'But For' Cause

There is no question that "causation is indeed a jurisdictional requirement" under § 1605(a)(7); the statute makes it a prerequisite to jurisdiction. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 363 U.S. App. D.C. 87, 376 F.3d 1123, 1127 (D.C. Cir. 2004). Sudan urges this Court to interpret the "caused by" element as requiring a plaintiff to plead that a defendant's material support of terrorism is the "but for" cause of the personal injury or death alleged. Such a rule was rejected by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *Kilburn*, which emphasized that, "as a moment's inspection of § 1605(a)(7) makes clear, there is no textual warrant for this claim: the words 'but for' simply do not appear; only 'caused by' do." 376 F.3d at 1128 (citations omitted). Instead, the D.C. Circuit held that § 1605(a)(7) requires only a showing of "proximate cause" to establish jurisdiction. *Id.* This conclusion was based on *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-38, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995), in which the United States Supreme Court held that the phrase "caused by" in the Extension of Admiralty Jurisdiction Act, 46 U.S.C. app. § 740, refers to proximate cause. The Supreme Court in *Grubart* explained that proximate cause is sufficient as a pleading requirement under the Extension of

Admiralty Jurisdiction Act because "this classic tort notion normally eliminates the bizarre." *Id.* at 536. As the Supreme Court explained, and the Kilburn court emphasized in the context of the terrorism exception, "[t]here is simply no need or justification for imposing an additional nonremoteness hurdle in the name of jurisdiction." *Grubart*, 513 U.S. at 538, *quoted in Kilburn*, 376 F.3d at 1128. This Court agrees: the phrase "caused by" in § 1605(a)(7) refers to "proximate cause."

b) The Factual Allegations

Whether the facts alleged are sufficient to establish proximate cause as a matter of pleading is a question of law. Proximate cause is "a cause-in-fact . . . treated by the law as sufficiently 'substantial' to warrant imposing liability upon the actor." *Farwell v. Un*, 902 F.2d 282, 290 (4th Cir. 1990) (citing Restatement (Second) of Torts §§ 430-33; Prosser & Keeton on Torts § 41 (5th ed. 1984)). In the context of pleading, proximate cause is satisfied when the facts contained in the complaint could, if proven, reasonably warrant holding the defendant liable. Put differently, the proximate cause standard permits the reasonable, while prohibiting the bizarre.

Plaintiffs allege that "Al-Qaeda could not have existed or planned its acts of terrorism, including an act directed at an American Naval vessel, without the support of sponsors of terrorism including Defendant Republic of the Sudan." (Am. Compl. ¶ 29, Doc. No. 10.) In support, they allege manifold facts from which a fact-finder could reasonably conclude that Sudan should be held liable for the bombing of the Cole. The allegations underpinning the alleged connection between the Cole bombing and Sudan's support to Al-Qaeda include claims that Sudan and Osama bin Ladin held joint holdings in

a company and a bank, that Sudan permitted transport of explosives through diplomatic pouches, that Sudan allowed Al-Qaeda to run training camps for terrorists within its borders, and, perhaps most damaging, that Sudan allowed an Al-Qaeda operative to ship crates filled with explosives from Sudan to the site of the Cole bombing. These allegations, if true, would permit an that Sudan's conduct was the proximate cause of the Cole bombing and the deaths of the seventeen American sailors aboard. Such an inference is reasonable and anything but bizarre. As a consequence, the facts pled are legally sufficient at the pleading stage.

Sudan argues that there is no "actual fact" that would support the conclusion that Sudan's conduct was the proximate cause of the Cole bombing. (Def.'s Mem. in Supp. of Mot. at 12, Doc. No. 42.) This could not be further from the case. For example, if Plaintiffs manage to prove that Sudan permitted the transport of explosives to Yemen around the time of the Cole bombing, Sudan could reasonably be linked to the attack. Likewise, if Plaintiffs managed to prove that the Al-Qaeda operatives who carried out the Cole bombing were trained in camps tacitly endorsed by Sudan, proximate cause could possibly be established. Finally, if Plaintiffs can prove at the liability phase that Sudan's financial dealings with Osama bin Ladin and Al-Qaeda provided the organization with the resources and opportunity to carry out the attack, legal causation could be established. *See Kilburn*, 376 F.3d at 1130 (holding, separately from the causation issue, that § 1605(a)(7) does not require a plaintiff to plead that a foreign state directly funded a specific terrorist act to proceed under the material support and resources clause because "money, after all, is fungible, and terrorist organizations can hardly be counted on to keep careful bookkeeping records").

Sudan argues to the contrary largely on the ground that the Complaint does not contain dates, times, and, in some instances, specific names or otherwise show a direct link between Sudan's conduct and the Cole bombing. While a failure to prove temporal proximity between Sudan's conduct and the Cole bombing may ultimately prohibit a finding of liability, the failure to plead specific dates and other such information at this point in the litigation, prior to the opening of discovery, and particularly when the allegations are otherwise specific and overwhelming, cannot suffice to invoke sovereign immunity at the pleading stage.

Congress' inclusion of the "caused by" requirement in the FSIA does not require a plaintiff to prove his claim at the pleading stage. To hold otherwise would confuse a jurisdictional inquiry with a trial on the merits and undermine general pleading rules. *See* Fed. R. Civ. P. 8(a). Indeed, adopting Sudan's position would create a jurisdictional sinkhole that would swallow the substantive law of liability. The D.C. Circuit recognized this:

> the only issue before us [at this stage] is *jurisdictional* causation, because § 1605(a)(7) is solely a jurisdictional provision. [citation omitted]. To succeed in the end, the plaintiff must go beyond jurisdiction and provide proof satisfying a substantive cause of action . . . . Any concerns about reaching too far to charge foreign states with the attenuated impact of their financial activities are better addressed as questions of substantive law. Indeed, to go further as a matter of jurisdiction – to accept [Sudan's] contention that § 1605(a)(7) requires a single causation standard that is more restrictive than the base-line standard of proximate cause – runs afoul of th FSIA's injunction that a non-immune "foreign state shall be

> liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

Kilburn, 376 F.3d at 1129; *cf. Owens v. Republic of Sudan*, 374 F. Supp.2d 1, 13-14 (D.D.C. 2005) (Bates, J.) ("It is noteworthy that the court in *Kilburn* emphasized that § 1605(a)(7) is only a jurisdictional framework, and that any lingering concerns that foreign states would be exposed to damages for remote or attenuated acts of support could be addressed through the substantive law of liability.")

As a matter of law, the factual allegations in the Complaint are sufficient to satisfy the "caused by" element of jurisdiction.

3. 'Material Support or Resources'

To satisfy this jurisdictional element, a plaintiff must plead that the foreign state provided material support or resources as defined by 18 U.S.C. § 2339A, which includes

> currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

18 U.S.C. § 2339A. So, to overcome sovereign immunity, FSIA plaintiffs must plead conduct that, if proven, would fall within this definition; a conclusory allegation that the foreign state provided "material support or resources" to terrorists is insufficient. Indeed, "in light of the serious and far-reaching

implications of the [terrorist exception and related FSIA provisions], it is especially important for the courts to ensure that foreign states are not stripped of their sovereign immunity unless they have been charged with actually [providing material support or resources to an act of terrorism]." *Price*, 294 F.3d at 93.

Sudan argues that Plaintiffs' allegations do not meet the legal definition of "material support or resources," contending that the alleged acts, even if true, are legally immaterial and that they are too conclusory to warrant waiving sovereign immunity. This argument is difficult to countenance. There is nothing legally immaterial or conclusory about the allegations in the Complaint. Plaintiffs claim that Sudan provided "safe harbor and shelter" to Osama bin Ladin and Al-Qaeda (Am. Compl. ¶ 27, Doc. No. 10), that it permitted the use of the diplomatic pouch for the transportation of explosives, that it gave Al-Qaeda operatives "*special authority* to avoid paying taxes and duties," and that it *"allowed"* Al-Qaeda to operate terrorist training camps in Sudan, among other allegations. (*Id.* ¶ 27.) These all fall within the definition of material support or resources, as they involve the provision of lodging, transportation, safe houses, explosives and facilities. These examples do not even make mention of the allegations of financial commingling between Sudan and Osama bin Ladin and Al-Qaeda (*Id.*), which constitutes the giving of currency, monetary instruments, financial securities, or financial services, all of which fall within the statutory definition of "material support or resources." In fact, these facts not only satisfy the definition of "material support or resources," but suggest the existence of a joint enterprise or partnership. If these allegations do not suffice to establish "material support or resources" for the purpose of jurisdiction, it is difficult to imagine what can.

Sudan relies heavily on the recent result in *Owens*, where the United States District Court for the District of Columbia Circuit ("D.C. District") concluded that allegations of "'cover', 'support', and 'sanctuary'," along with "a single allegation that a meeting occurred in the Republic of Sudan between the leaders of al Qaeda and Hizbollah to plan embassy attacks" were too conclusory to establish jurisdiction. 374 F. Supp.2d at 12. As explained, the Complaint in this case goes well beyond such curt allegations, claiming that specific business relationships between Sudan and Osama bin Ladin and Al-Qaeda existed, that transportation of explosive devices, including to the place where the USS Cole was bombed, was either endorsed or permitted, and that Sudan allowed terrorist training to take place within its borders. (Am. Compl. P27, Doc. No. 10.) A greater degree of specificity may be required to entitle Plaintiffs to relief, but not to entitle them to jurisdiction. Again, to require more would subsume the law of liability into the law of jurisdiction.

Defendants also rely on two recent D.C. Circuit cases, which concluded that factual allegations of torture and hostage taking were insufficient to establish jurisdiction under § 1605(a)(7). First, in *Price*, the D.C. Circuit held that mere allegations of "kicking, clubbing, and beatings" are insufficient to invoke the "torture clause" of the FSIA terrorist exception. 294 F.3d at 93. In support, the *Price* court emphasized that the legal definition of torture involves not only the conduct involved, but also requires a measuring of the severity of the conduct and the purpose of the conduct. *See id.* at 92-94. As a consequence, bald allegations of kicking, clubbing, and beatings, without more, provide no information from which a court can discern, at the pleading stage, whether the conduct alleged actually constitutes torture. "In short, there is no way to discern whether plaintiffs'

complaint merely alleges police brutality that falls short of torture." *Id.* at 93-94.

Similarly, in *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 356 U.S. App. D.C. 3, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit concluded that allegations by a plaintiff that she was "held captive and incommunicado for several months" do not, in and of themselves, satisfy the requirements of the "hostage taking clause" of the FSIA terrorist exception because being held captive and incommunicado does not fall within the definition of "hostage taking." *Id.* at 235. "'Hostage taking' occurs under [FSIA] when a person seizes or detains and threatens to kill, to injure or to continue to detain another person *in order to compel a third party* . . . to do or abstain from doing any act as an explicit or implicit condition for the release of a hostage." *Id.* at 234 (internal quotation marks omitted) (emphasis added). The complaint in *Simpson* was insufficient because it did not allege that the purpose of the plaintiff's being taken captive was "in order to compel a third party" to do anything at all.[13]

In contrast, the definition of "material support or resources" requires no evaluation of degree or even of purpose. Section 2339A of Title 18 proscribes specific conduct, not conduct to a specific extent or for a specific purpose. In any event, to the extent that either degree or purpose is an issue with respect to the provision of material support or resources, both are covered by the proximate cause pleading requirement. As explained above, the allegations pled in the Complaint, if true, more than suffice to satisfy the

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[13] It is worth noting that ultimate remedy for the pleading insufficiencies in *Price*, *Simpson*, and *Owens* was to grant the plaintiffs leave to amend.

jurisdictional element for proximate cause. Likewise, they more than suffice to satisfy the jurisdictional element of providing material support and resources. As a matter of law, the factual allegations in the Complaint are sufficient to satisfy the "material support or resources" element of jurisdiction.

4. 'Within the Scope'

Finally, Sudan contends that the Plaintiffs' Complaint does not sufficiently allege that officials, employees, or agents of the Sudanese government who committed the acts alleged acted within the scope of their governmental position. To the contrary, the Complaint does so allege.

As an initial matter, the Complaint summarily alleges that "[t]he provision of material support or resources was engaged in by officials, employees and agents of the Republic of Sudan while such officials, employees or agents were acting within the scope of their office, employment or agency." (Am. Compl. ¶ 26, Doc. No. 10.) The facts alleged in the subsequent paragraphs of the Complaint support that assertion. Activities such as permitting the use of diplomatic pouches to transport explosives, waiving payment of taxes and duties, allowing the formation of terrorist training camps, and establishing a company and bank with Osama bin Ladin could reasonably have been done within the scope of a government duty. In fact, these are allowances that only individuals in the highest echelons of government can make. In the United States, for instance, even a Federal Judge or a single member of the Congress cannot provide diplomatic pouches or waive taxes and duties. These are acts that can only be taken within the scope of a specific government role and, more likely than not, by an upper-level member of the government accorded significant discretion; only the duly designated representative of a government may utilize diplomatic privileges and

pouches. It is accordingly reasonable to infer, assuming the truth of the facts pled, that the material support and resources alleged were provided by government officials acting within the scope of their duties. As a matter of law, the factual allegations in the Complaint are sufficient to satisfy the "within the scope" element of jurisdiction.

D. Conclusion

At the core of Sudan's subject matter jurisdiction challenge is the contention that the factual allegations in the Complaint, even if true, and even permitting all reasonable inferences, would not prove a direct link between Sudan, Al-Qaeda, and the bombing of the USS Cole. Absent proof of a direct link, so goes the argument, there is no causal connection and any support given must have been de facto immaterial. However, imposing a requirement at the pleading stage that a plaintiff allege, with exacting specificity, a direct link between a foreign state and a terrorist organization, be it under the jurisdictional element of proximate cause or material support, would undercut the jurisdiction that § 1605(a)(7) confers. The essence of state sponsorship of terrorism is that the foreign state is not the direct actor. State sponsors of terrorism *sponsor, foster* and *promote* terrorism, they do not carry the acts out themselves. Requiring a plaintiff to plead and/or demonstrate a direct link at this stage in a case would render the FSIA terrorist exception meaningless. In any event, the facts alleged here, assuming their truth, evince a partnership that, at the pleading stage, constitute a direct link between Sudan and Al-Qaeda or evince an agency relationship similar to that which diplomats enjoy.

Moreover, it is not as if Sudan is not accorded sufficient protection under the terrorist exception to the FSIA. As explained above, there are two manners in which to challenge

a courts' subject matter jurisdiction in a FSIA case: by challenging the legal sufficiency of the allegations as pled, as was the case here, or, alternatively, challenging the actual sufficiency of the jurisdictional evidence. *See supra* Part II.A. and note 6. Had Sudan selected the former, limited jurisdictional discovery would have been ordered and Plaintiffs would have faced a heightened jurisdictional burden. Sudan did not choose that course.

As a matter of law, the factual allegations in the Complaint are sufficient to satisfy the requisite elements of jurisdiction under the FSIA terrorism exception and the material support and resources clause in particular. Accordingly, the Motion to Dismiss for want of jurisdiction over the subject matter is **DENIED.**

III. PERSONAL JURISDICTION AND SERVICE OF PROCESS

In its memorandum in support of its June 17, 2005 Motion to Vacate Default (Doc. No. 30), Sudan argued that this Court lacks jurisdiction *in personam* on the grounds that process and service of process were defective. This contention was not raised in Sudan's original moving papers to vacate default. (Doc. No. 29.) This Court consequently concluded that Sudan waived personal jurisdiction by filing its Motion to Vacate Default without asserting any personal pleas. (Minute Order of June 30, 2005, Doc. No. 35; *supra* note 1; *supra* Part I.B.) Nevertheless, at the June 30, 2005 hearing on Sudan's Motion to Vacate Default, this Court addressed the merits of Sudan's contention that process was deficient, finding that process complied with the requirements of the FSIA, Rule 4 of the Federal Rules of Civil Procedure, and Virginia law. (*See id.*) Parts III.A and B of this

Memorandum Opinion and Order memorializes the reasons for this Court's decisions of June 30, 2005.

Even though this Court conclusively resolved the personal jurisdiction plea at the June 30, 2005 hearing, Sudan has reasserted it and, this time, leveled a new argument: Sudan now contends that exercising personal jurisdiction would violate the Due Process Clause of the Fifth Amendment to the United States Constitution because it lacks sufficient minimum contacts with the forum state. Since Sudan already waived personal jurisdiction, this argument is moot. However, even if it is ultimately determined on appeal that Sudan did not waive personal jurisdiction by filing its June 30, 2005 Motion to Vacate Default without setting forth in the Motion such a plea, Sudan is estopped from raising the minimum contacts argument by virtue of the fact that it subsequently raised a personal jurisdiction plea on other grounds, the merits of which have been settled. Sudan lost the benefit of a Due Process defense by failing to raise it along with its process and service of process arguments in its memorandum supporting the Motion to Vacate Default. Nonetheless, even if Sudan properly asserted its minimum contacts defense, personal jurisdiction still obtains because the Due Process Clause does not apply to foreign states and fundamental fairness and substantial justice are not undermined by haling Sudan to the Eastern District of Virginia to defend this case. The reasoning for this is explained in Part III.C.

A. Waiver

"Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). A personal jurisdiction

plea not raised by a preliminary Rule 12 motion or asserted in a party's first responsive pleading is forever waived. Fed. R. Civ. P. 12(h)(1). Indeed, time is of the essence when it comes to personal defenses such as want of jurisdiction *in personam*. *See infra* Part IV.A. The issue of personal jurisdiction must be raised seasonably, for it "is indubitably waived absent timely objection." *Porsche Cars North America, Inc. v. Porsche.Net*, 302 F.3d 248, 257 (4th Cir. 2002); *see also Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385, 394 (4th Cir. 2004)("Unlike subject matter jurisdiction, the requirement of personal jurisdiction may be waived. . . . Thus, even if the district court in fact lacked personal jurisdiction over a party, the failure to timely raise the defense may result in the enforcement of a judgment that the district court was, in one sense, powerless to render."); *Foster v. Arletty 3 Sarl*, 278 F.3d 409, 413 (4th Cir. 2002) ("[A] defendant may consent to a court's exercise of jurisdiction either implicitly or explicitly, and '[a] variety of legal arrangements have been taken to represent' this consent. *Insurance Corp. of Ireland*, 456 U.S. at 703."). Accordingly, a defendant must "exercise great diligence in challenging personal jurisdiction . . . or service of process." 5 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1391 (3d ed. 2004) ("*Wright & Miller*").

The Republic of Sudan did not exercise great diligence in challenging personal jurisdiction in this case. On June 17, 2005, Sudan entered its first appearance after having been in default since February of that year and since having been on notice of the suit since December 16, 2004. *See supra* Part I.B. Based on the language contained in the Motion to Vacate Default, the purpose of Sudan's appearance was to vacate default and cancel the evidentiary hearing scheduled for August 23, 2005 so that it could defend the lawsuit, not to

assert a personal jurisdiction defense. Indeed, the Motion was styled as a "Motion to Vacate Entry of Default and Cancel Evidentiary Hearing" and asked "for an Order vacating the Entry of Default and Canceling the Evidentiary Hearing currently set for August 23, 2005 . . .," and *nothing else*. (Doc. No. 29.) Accompanying the Motion to Vacate Default was a memorandum of law in support. (Doc. No. 30.) The memorandum of law, unlike the moving paper, alleged that "the Court lacks personal jurisdiction over Sudan because Plaintiffs have not effected service of process on Sudan in accordance with [28] U.S.C. § 1608(a)." (*Id.* at 3.) At no time did Sudan actually *move* the Court for dismissal on the ground of personal jurisdiction. By failing to do so, Sudan implicitly waived personal jurisdiction. Moreover, a memorandum of law is not in any sense a motion.

At the June 30, 2005 hearing on the Motion to Vacate Default, Sudan urged the Court to incorporate its personal jurisdiction plea into the Motion to Vacate Default because the Motion made reference to the memorandum of law. (Tr. of Hrg. at 13-14, Doc. No. 36.) Refusing to do so, Sudan argued, "would be a colossal triumph of form over substance." (*Id.*) The fact is, however, that form matters when it comes to the assertion of personal defenses. If form did not matter, the Federal Rules of Civil Procedure would not impose a requirement that personal jurisdiction defenses be pled in a preliminary motion or in the party's first responsive pleading. In addition, the distinction between a moving paper and a memorandum of law is not one to be taken lightly. A moving paper makes a specific *request for relief* of some sort from a court. A memorandum of law in support, on the other hand, supplies the *reasons* why the moving party is entitled to that relief. *See* E.D. Va. Local R. Civ. P. 7(A) and 7(F) (setting forth the distinct requirements of motions and memoranda of law and requiring a separate

memorandum to be submitted with all motions filed). If moving papers are permitted to incorporate additional requests for relief stated in associated memoranda, there would be no purpose for requiring a separate moving paper in the first place. A memorandum of law supports a matter. It does not, and cannot be permitted to, control a matter. (*See* Tr. of Hrg. at 14, Doc. No. 36.) Otherwise, the tail wags the dog.

Moving to vacate default is a request for permission to defend a suit; objecting to personal jurisdiction is a request to be freed from the burdens of suit. By moving to vacate default, without also moving to dismiss for want of personal jurisdiction, Sudan asked, first and foremost, to come aboard the litigation so that it could mount a defense on the merits. This constitutes a general appearance. Upon making a general appearance, the defense of jurisdiction over the person is forever waived. Sudan's failure to raise the issue of personal jurisdiction in its moving paper may have been inadvertent, but the law of personal defenses assigns consequences for such inadvertence. Personal privileges simply must be raised at the outset of a party's entry into a case. Accordingly, Sudan waived the defense of lack of jurisdiction *in personam*.

B. Personal Jurisdiction: Service of Process

Sudan's original personal jurisdiction plea, asserted in the memorandum of law accompanying its Motion to Vacate Default, alleged that personal jurisdiction does not exist because service of process did not comply with the requirements of the FSIA. Even if Sudan had not waived personal jurisdiction through its general appearance to vacate default, this Court still has personal jurisdiction by virtue of the fact that process was served effectively.

1. The Statutory Framework

Just as with subject matter jurisdiction, the FSIA is the sole source of personal jurisdiction over a foreign state.[14] *See Amerada Hess*, 488 U.S. at 435 n.3. According to subsection (b) of 28 U.S.C. § 1330, "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." Accordingly, a federal district court may exercise personal jurisdiction over a foreign state if, and only if, 1) process and service of process comply with the requirements of § 1608 of the FSIA, and 2) the foreign state is not entitled to sovereign immunity under §§ 1605-07. *See Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391, 394 (E.D. Va. 1984) (Doumar, J.) ("*Unidyne I*") ("The [FSIA] makes the statutory prerequisite for personal jurisdiction a two-step process: subject matter jurisdiction plus proper service of process equals personal jurisdiction."); *see also Amerada Hess*, 488 U.S. at 435 n.3 ("Thus, personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§ 1605-1607 applies."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 n.14, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983) (same); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 398,

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[14] The FSIA is the sole source of personal jurisdiction over a foreign state because the protections of Due Process are not extended to foreign states. *See infra* Part III.C. Even Sudan endorsed this view in its memorandum in support of its Motion to Vacate Default, arguing that "[t]he FSIA is the sole basis for obtaining subject matter *or personal jurisdiction* of a U.S. court over a foreign sovereign." (at 3, Doc. No. 30; emphasis added.) Having expressed this view to the Court, Sudan's unseasonable minimum contacts argument is all the more incredible.

399 (E.D. Va. 1984) (Doumar, J.) ("*Unidyne II*") ("*In personam* jurisdiction is established only if proper service is effected under 28 U.S.C. § 1608."). Since the Court has already determined that the terrorist exception to foreign sovereign immunity applies to this case, see supra Part II, the only question remaining with respect to personal jurisdiction is whether service of process was proper.

According to the FSIA,

> (a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> > (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
> >
> > (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
> >
> > (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign site, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or
> >
> > (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons

> and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(a). These procedures are the exclusive means of serving process on a foreign state. *Unidyne II*, 590 F. Supp. at 401; *see also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 308 U.S. App. D.C. 86, 30 F.3d 148, 154 (D.C. Cir. 1994) ("We hold that strict adherence to the terms of § 1608(a) is required."); Fed. R. Civ. P. 4(j)(1) ("Service upon a foreign state . . . shall be effected pursuant to 28 U.S.C. § 1608."). The means for serving process are hierarchical in application. A plaintiff must thus attempt to utilize the method prescribed by subsection (3) before resorting to the method prescribed by subsection (4). *Unidyne II*, 590 F. Supp. at 401.

2. Discussion and Analysis

The parties agree that service of process under either subsection (1) or (2) was unavailable to Plaintiffs. Accordingly, they proceeded to serve process under subsection (3), which requires that process "be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). It is undisputed that Plaintiffs' process papers were addressed to the Minister of Foreign Affairs and

returned executed by certified mail to the Sudanese Embassy in Washington, D.C. for delivery to the Minister of Foreign Affairs in Sudan via diplomatic pouch. (*See* Doc. Nos. 8, 9, 12, 13.) In addition to utilizing the procedure in subsection (3), it is also undisputed that Plaintiffs subsequently served process via the United States Secretary of State pursuant to subsection (4).[15] (*See* Doc. Nos. 17, 31.)

Defendant contends that service was improper under subsection (3) because, though the process papers were addressed to Sudan's "Minister of Foreign Affairs," they were delivered to the Sudanese Embassy in the United States.[16] Sudan alleges that subsection (3) requires that process be delivered directly to the Minister of Foreign Affairs in Sudan, as opposed to delivering it to him via that country's embassy. Delivery by a diplomatic bag, Sudan alleges, is forbidden. As Sudan argues in its brief, "the U.S. Postal Service provides registered mail with return receipt to Khartoum, Sudan, and private companies such as DHL offer deliveries to Sudan with signed receipts." (Def.'s Memo. in Supp. of Mot. to Vacate Default at 10, Doc. No. 30.)

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[15] Sudan contends that the procedures set forth in subsection (4) were not available to Plaintiffs because they did not comply with the requirements of subsection (3). This argument is moot, as Plaintiffs service of process did in fact comply with subsection (3).

[16] By sheer virtue of Sudan's appearance to vacate default, there is no question that Sudan was accorded actual notice of this suit. Though the FSIA provides the exclusive means of serving process on a foreign state, since Plaintiffs allege causes of action arising under Virginia law, *see infra* Part I.A, and further since they have haled Sudan to a federal court in Virginia, it is noteworthy that Virginia permits actual notice to cure other service defects. *See* Va. Code § 8.01-288.

However, this argument ignores the inherent reliability and security associated with diplomatic pouches. The diplomatic bag, unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of documents between countries and among duly qualified government officials. *See* Vienna Convention on Diplomatic Relations, arts. 27 & 40, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. Surely the legislature did not intend to designate the United States Postal Service or a commercial carrier as the preferred method of delivery to the Minister of Foreign Affairs. The text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served. Sudan does not cite a single case in support of its position. To the contrary, the caselaw it cites involve instances where service was directed to a *person* other than the Minister of Foreign Affairs, not to a *place* other than the Ministry of Foreign Affairs. *See, e.g., Magness v. Russian Fed'n*, 247 F.3d 609, 613 (5th Cir. 2001) (directing service to the president of the Russian Federation); *Transaero*, 30 F.3d at 153 (directing service to an ambassador).[17] Accordingly, Sudan's objection to the sufficiency of process and service of process is overruled.

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[17] In the present Motion to Dismiss, in addition to reasserting its challenge to service of process, Sudan also challenges the sufficiency of process. However, Sudan presents no reason why process itself was insufficient in either its memorandum of law in support of its Motion to Vacate Default (Doc. No. 30), or in its memorandum of law in support of this Motion. (Doc. No. 42.) Accordingly, Sudan's unsupported allegation that process was not legally sufficient is without merit.

C. Personal Jurisdiction: Minimum Contacts

Pursuant to the analysis above, *supra* Part III.A and B, Sudan is subject to personal jurisdiction under the terms of the FSIA. Even so, a statute cannot confer personal jurisdiction where the Constitution forbids it. *Price*, 294 F.3d at 97. Sudan alleges that the Due Process Clause of the Fifth Amendment does not permit the exercise of personal jurisdiction by this Court because Sudan lacks sufficient minimum contacts with the forum. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). This argument fails on three accounts. First, Sudan is estopped from raising this ground by virtue of the fact that it did not raise it along with its challenge to the sufficiency of service of process, even though that challenge was itself untimely. Second, the Due Process Clause does not apply to foreign states. Finally, even if it did, haling Sudan to the Eastern District of Virginia to defend this lawsuit does not offend traditional notions of fair play and substantial justice, which undergird Due Process.

1. Estoppel

"[W]hen a defendant appears and challenges jurisdiction, it agrees to be bound by the court's determination on the jurisdictional issue." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998), *cited in Foster*, 278 F.3d at 413. Accordingly, a defendant that raises a personal jurisdiction plea, timely or not, is estopped from reasserting it under the guise of a new legal argument. *See Insurance Corp. of Ireland*, 456 U.S. at 704 ("[F]or various reasons a defendant may be estopped from raising the issue [of personal jurisdiction]."); *see also Index Fund, Inc. v. Hagopian*, 107 F.R.D. 95, 101 (S.D.N.Y. 1985) ("As explained in the Advisory Committee's Notes on Rule

12(h)(1)(A), . . . 'specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived.'").

In its memorandum of law in support of its Motion to Vacate Default, Sudan objected to the personal jurisdiction of this Court by challenging the sufficiency of process and service of process, despite not raising the matter of personal jurisdiction in its actual moving paper. Though that plea was untimely in and of itself, which resulted in an implicit waiver of personal jurisdiction, the Court nonetheless addressed the merits of Sudan's arguments. *See supra* Part III.B. Assuming for the sake of argument that the memorandum of law raised a proper challenge to the Court's personal jurisdiction, Sudan bound itself to the Court's resolution of the issue. The Court conclusively resolved the personal jurisdiction plea at the June 30, 2005 hearing on Sudan's Motion to Vacate Default (Tr. of Hrg. at 30, Doc. No. 36), the reasons for which are memorialized above in Part III.B. Sudan is therefore estopped from raising another personal jurisdiction plea under new auspices.

2. Minimum Contacts

Even if Sudan was not estopped from asserting a new legal argument in opposition to personal jurisdiction, its Due Process challenge would fail because a foreign state is not a "person" for purposes of the Fifth Amendment to the Constitution. The Due Process Clause requires that a defendant "not present within the territory of the forum . . . have certain minimum contacts with it such that the maintenance of the suit does offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). Only "persons" are afforded this

protection. *See* U.S. Const. amend. V ("No *person* shall . . . be deprived of life, liberty, or property, without due process of law . . . ." (emphasis added)). Many courts, including this one, have proceeded as if a foreign state is a "person" for purposes of evaluating jurisdiction. *See, e.g., Unidyne Corp. v. Aerolineas Argentinas*, 640 F. Supp. 354, 360 (E.D. Va. 1985) (Doumar, J.) ("*Unidyne III*") ("An FSIA defendant is entitled to the same constitutional protections in this Court as an out-of-state corporation . . . or other alien corporations . . . ."); *see also Price*, 294 F.3d at 96 (collecting examples). However, since this Court's holding in *Unidyne III*, the United States Supreme Court has indicated that the question whether a foreign state is a person for purposes of Due Process remains open. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992) ("Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause . . ."). Indeed, it is apparent that the assumption that a foreign state is a person is merely an unchallenged assumption.

Only the D.C. Circuit has addressed the question whether a foreign state is a "person" for purposes of Due Process head on. It held that a foreign state is not a person, primarily on the ground that

> it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric fo that system. . . . Given this fundamental dichotomy between the constitutional status of foreign states and States within the United States, we cannot perceive why the former should be permitted to avail

> themselves of the fundamental safeguards of the Due Process Clause if the latter may not.

Price, 294 F.3d at 96-7. Further underpinning the "fundamental dichotomy" between the status of foreign states and States of the United States is the fact that the Constitution imposes no limits on the powers of foreign states, whereas it imposes manifold limits on the powers of the States:

> [T]he Constitution does not limit foreign states, as it does the States of the Union, in the power they can exert against the United States or its government. Indeed, the federal government cannot invoke the Constitution, save possibly to declare war, to prevent a foreign nation from taking action adverse to the interest of the United States or to compel it to take action favorable to the United States. It would therefore be quite strange to interpret the Due Process Clause as conferring upon [a foreign state with] rights and protections *against* the power of federal government.

Id. at 97 (emphasis in original). This Court agrees: to afford foreign states rights and protections against the United States Government that are not similarly extended to the States of the Union, would result in an irony not countenanced by the Constitution.

Congress appears to have recognized this when it enacted the FSIA. Unlike most statutes, the FSIA contains a specific provision for personal jurisdiction, conditioning it on effective service of process and the existence of subject matter jurisdiction. Ordinarily, statutes do not contain requirements for personal jurisdiction. The reason is obvious: the sole source for personal jurisdiction over a person is the

Constitution. A statute may not provide for personal jurisdiction where the Constitution forbids it. By providing for personal jurisdiction in the FSIA, Congress implicitly endorsed the view that the Constitution does not limit a court's jurisdiction *in personam* over foreign states. *Cf. Amerada Hess*, 488 U.S. at 435 n.3 ("Personal jurisdiction . . . exists only when one of the exceptions to foreign sovereign immunity in §§ 1605-1607 applies. [citation omitted]. Congress' intention to enact a comprehensive statutory scheme is also supported by the inclusion in the FSIA of provisions for venue, 28 U.S.C. § 139 (f), removal, § 1441(d), and attachment and execution, §§ 1609-1611."). In fact, the minimum jurisdictional contacts and adequate notice requirements of Due Process are implicit in the FSIA's provisions for personal jurisdiction. *See* H.R.Rep. No. 1487, 94th Cong. 2d Sess., *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604. Had Congress believed that a foreign state was afforded Due Process protection, it would not have enacted the FSIA's exacting personal jurisdiction requirements in the first place.

Sudan cites three cases in support of its position that a foreign state is a person for purposes of Due Process. *See Altmann v. Republic of Austria*, 317 F.3d 954, 970 (9th Cir. 2002) (involving the FSIA expropriation exception); *S & Davis Int'l, Inc. V. Yemen*, 218 F.3d 1292, 1303-04 (11th Cir. 2000) (involving the FSIA commercial exception); *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 134 (2d Cir. 1998) (same). Each of these cases was decided after *Weltover*. Accordingly, like the Supreme Court, the courts in each case assumed, but did not decide, that a foreign state is a person for purposes of Due Process because, in each instance, the defendant had sufficient minimum contacts with the forum to warrant exercising personal jurisdictional. Moreover, none of these cases involved the terrorist exception

to the FSIA, which presents a fundamentally different paradigm than any of the other exceptions to foreign sovereign immunity. It will almost never be the case that an alleged state sponsor of terrorism will have the type of minimum contacts with the forum that a state engaged in expropriating property, commercial enterprises, or other activities, private or public, will have. State sponsors of terrorism do not enter into contracts in, conduct business in, negotiate deals in, or travel regularly to the States within the United States. While there is no question that the minimum contacts test is the lodestar of Due Process under *International Shoe*, it could hardly be said that haling a foreign state listed on the United States Department of State's state sponsors of terrorism list, which is accused of providing material support and resources to operatives of Al-Qaeda who targeted American sailors when they bombed the USS Cole, into an American court undermines traditional notions of fair play and substantial justice. This is not a case concerning commercial enterprises or similar private acts. Applying the minimum contacts test as developed in the context of expropriation, commercial activities, or garden variety torts would prohibit nearly every case brought under the terrorism exception to the FSIA. That is a result that the FSIA does not contemplate, and which the United States Constitution does not require.

For all the above reasons, Sudan's personal jurisdiction plea alleging insufficient process and service of process, as well as a lack of minimum contacts with the forum state, is **DENIED.**

IV. VENUE

The Republic of Sudan contends that the Eastern District of Virginia, Norfolk Division, is an improper venue and requests dismissal or, in the alternative, transfer to the United

States District Court for the District of Columbia. Sudan's objection to venue is overruled. As with personal jurisdiction, Sudan waived its objection to venue by not raising it in its first responsive pleading and by virtue of the fact that it defaulted. In any event, even if Sudan had not waived its exception to venue, the objection is without merit.

A. Waiver

A plea of improper venue must be raised in a preliminary Rule 12 motion or included in a defendant's first responsive pleading or it is waived. Fed. R. Civ. P. 12(h)(1)(A). Indeed, "[a] defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default." *Hoffman v. Blaski*, 363 U.S. 335, 343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) (citing *Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 179, 49 S. Ct. 98, 73 L. Ed. 252 (1929)); *see also* 15 *Wright & Miller* § 3829.

In this case, the Republic of Sudan did not take exception to venue until the present Motion to Dismiss. Prior to bringing this Motion to Dismiss, Sudan filed its Motion to Vacate Default. As explained above, Sudan's Motion to Vacate Default, in and of itself, constituted a general appearance whereby it waived those personal privileges not included in that Motion. Sudan is of the position that its memorandum supporting its Motion to Vacate Default, which asserted a personal jurisdiction plea not included in its moving papers, should be incorporated by reference into its Motion to Vacate Default. This Court rejected that position. *See supra* Part III A. However, even if it were the case that Sudan's memorandum of law and the personal jurisdiction plea it asserted therein was part and parcel of its general appearance to vacate default, and therefore was not waived, Sudan did not

raise a plea of improper venue until *this* Motion to Dismiss. The present Motion to Dismiss is the *first* instance in which the matter of venue has been raised.

Not only did Sudan not raise its venue objection until *after* filing its Motion to Vacate Default, *after* filing a memorandum of law containing an unseasonable and insufficient personal jurisdiction plea, and *after* appearing in Court to argue in favor of vacating default, Sudan took the additional steps of proposing a scheduling order for the subject matter jurisdiction inquiry and taking part in a telephonic status conference to discuss the scope of its subject matter jurisdiction challenge and other scheduling matters. *See supra* Part I.B. Those additional steps were not taken under objection. Having indisputably failed to raise a venue objection in its first defensive move, and then participating in this litigation as though it believed venue was proper in the first place, Sudan forever waived its venue objection. *See Hagopian*, 107 F.R.D. at 101-02 (emphasizing the care a defendant must take to ensure that personal defenses are raised in the first defensive move). What is more, any objection to venue was also waived by virtue of Sudan's default, especially given that it waited until more than six months after being served with process to appear and defend. *See Hoffman*, 363 U.S. at 343.

B. Statutory Requirements

Even if Sudan did not waive venue, the Eastern District of Virginia, Norfolk Division is a proper venue for this suit. Federal statute prescribes four possible venues in cases involving a foreign sovereign brought pursuant to the FSIA:

1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred,

> or a substantial part of property that is the subject of the action is situated;
>
> 2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
>
> 3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
>
> 4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1391(f). Sudan argues that none of the first three possibilities for venue prevail in this case and accordingly request that the matter be dismissed or transferred to the United States District Court for the District of Columbia pursuant to subsection (4). *See also* 28 U.S.C. § 1404(a). To the contrary, venue is proper pursuant to subsection (1).

Plaintiffs' Complaint does not specifically allege that venue is proper under any of the possible venues demarcated by § 1391(f). Rather, in the "Jurisdiction and Venue" allegation, the Complaint merely alleges that

> [a]t the time of the incident complained of herein, the location of the principal place of residence of [several of the] Plaintiffs . . . is within the Eastern District of Virginia. Each of Plaintiffs' decedents was immediately prior to their death stationed aboard the U.S.S. Cole permanently stationed in the harbor in

> Norfolk, Virginia, located within the Eastern District of Virginia.

(Am. Compl. ¶ 1, Doc. No. 10.) Since this action does not arise under § 1605(b) or § 1603(b) of the FSIA, the only candidate for venue other than the District Court for the District of Columbia is subsection (1), which permits a case to be brought against a foreign sovereign "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." At first blush, it appears that there is no judicial district in which a substantial part of the events giving rise to the claim occurred; because the bombing of the USS Cole took place in Yemen, it would appear that the facts giving rise to the cause of action arose there, and not in the Eastern District of Virginia. In fact, that is not the case.

Norfolk, Virginia is an appropriate venue because the decedent sailors were stationed in the Eastern District of Virginia in Norfolk, the USS Cole was home ported in Norfolk,[18] and several of the Plaintiffs are citizens of the Commonwealth who reside in Norfolk. Indeed, a substantial portion of the events giving rise to this cause of action actually did occur in Norfolk, Virginia. Under general admiralty law, a tort committed at sea "is deemed to occur[] not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action." *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 92 (N.D. Cal. 1954). As the

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[18] In admiralty cases, a vessel may be considered as constructively part of the territory or state in which it was docked. *See Wilson v. Transocean Airlines*, 121 F. Supp. 85, 88 (N.D. Cal. 1954).

bombing of the Cole took place in extraterritorial waters, general principles of admiralty supply a basis for ascertaining where the cause of action arose. Moreover, though the damages alleged were caused by an act in a port in Aden, Yemen, the Plaintiffs' alleged loss of solatium or consortium, loss of love, affection, companionship, advice, and comfort as a consequence of wrongful death (Am. Compl. ¶ 32, Doc. No. 10), and loss of support due to the loss of earnings and earning capacity (Proposed Am. to Supp. Am. Compl. at 2, Pt. II, Doc. No. 28.), occurred in the place of residence of the Plaintiffs, not in the place of death of the sailors aboard the Cole. For example, the alleged intentional infliction of emotional distress off the Plaintiffs could only occur where they are. Since several of the Plaintiffs reside in the Eastern District of Virginia, and this is where their injuries arose, the cause of action can be said to have arisen here. Consequently, this is a proper venue under subsection (1) of § 1391(f).

In addition, as a general rule, "[a]ctions for personal injury or death are transitory and may be brought in any court having jurisdiction over the parties and the subject matter of the case." *Pratt v. Kelly*, 585 F.2d 692, 695 (4th Cir. 1978); *see also Dennick v. Central R. Co. of New Jersey*, 103 U.S. 11, 18, 26 L. Ed. 439 (1880) ("Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."). While the exact source of law entitling Plaintiffs to relief, if any, is as yet undetermined, *see infra* Part V., this action is primarily for personal injury or death. Indeed, 28 U.S.C. § 1605(a)(7) only permits jurisdiction of civil actions for "personal injury or death," which this is one. Since this Court has jurisdiction over the subject matter and

in personam, and the cause of action of is transitory, this is a proper venue.[19]

For all of these reasons, the Republic of Sudan's Motion to Dismiss for improper venue is **DENIED.**

V. FAILURE TO STATE A CLAIM

While the FSIA vests jurisdiction in federal courts to hear cases involving foreign states, the FSIA does not, in and of itself, afford plaintiffs with a substantive cause of action for which they are entitled to a remedy. *See* 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . ."); *First Nat'l City Bank v. Banco Para El Cercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983) ("The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality . . ."). The D.C. Circuit has explicitly held that 28 U.S.C. § 1605(a)(7) does not "create[] a private right of action against a foreign government," but rather "merely waives the immunity of a foreign state without creating a cause of action against it . . . ." *Cicippio-Puleo*, 353 F.3d at 1033. It is for this reason that, in FSIA cases,

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[19] It should be noted that Sudan has not leveled any allegation that litigating in this venue undermines public policy, is incapable of affording adequate relief to either party, or an alternative forum is better than this one. *See Kontoulas v. A.H. Robins Co., Inc.*, 745 F.2d 312, 315 (4th Cir. 1984) (discussing the common law *forum non conveniens* doctrine). Even had Sudan so contended, there is no basis for such an argument.

"[t]he first inquiry is whether there has been a waiver of sovereign imm ity. If there has been such a waiver, as in this case, the s nd inquiry comes into play-that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *FDIC v. Meyer*, 510 U.S. 471, 484, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

In accordance with this framework, in addition to the jurisdictional allegations addressed above, Plaintiffs' Complaint alleges that they are entitled to relief under the following sources of substantive law: 1) state common law or statutory law for wrongful death for the State of residence for each victim killed in the bombing of the USS Cole; 2) state common law or statutory law for intentional infliction of mental or emotional distress for each Plaintiff; 3) state common law or statutory law for battery for each Plaintiffs' decedent; 4) federal common law for loss of solatium for each Plaintiff as set forth in *Surrette v. Islamic Republic of Iran*, 231 F. Supp.2d 260 (D.D.C. 2002); and, 5) the Restatement of Torts (Second) § 46(2). (Proposed Am. to Supp. Am. Compl. at 2, Pt. VI, Doc. No. 28.) Under these sources of law, Plaintiffs contend that they are entitled to damages for loss of solatium or consortium, loss of love, affection, companionship, advice, and comfort as a consequence of wrongful death (Am. Compl. ¶ 32, Doc. No. 10), and for loss of support due to the loss of earnings and earning capacity. (Proposed Am. to Supp. Am. Compl. at 2, Pt. II, Doc. No. 28.)

The Republic of Sudan counters that the only proper source of law for Plaintiffs' action is the Death on the High

Seas of Act ("DOHSA"),[20] which permits civil actions by personal representatives claiming damages for wrongful death occurring on the high seas, "in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." *See* 46 U.S.C. app. § 761. Sudan argues that the DOHSA supplies the exclusive remedy in this instance. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986). Furthermore, Sudan contends that Plaintiffs' claim is barred by the DOHSA's three-year statute of limitations. 46 U.S.C. app. § 763a. Accordingly, Sudan urges dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

It is premature for this Court to reach the issue of what substantive source of law, if any, would entitle Plaintiffs to relief under the facts pled in the Complaint. It is equally premature to decide whether the DOHSA applies to this case and, if it does, whether it supplies Plaintiffs with the exclusive substantive cause of action. As the D.C. Circuit has emphasized, "sovereign immunity is immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Foremost-McKesson, Inc.*, 905 F.2d at 443 (internal quotations omitted). Deciding what substantive law applies to this case prior to affording Sudan the opportunity to pursue an interlocutory appeal of the threshold jurisdictional issues raised by the present Motion, *see supra* note 6, would effectively impose upon it the burdens of litigation prior to conclusive resolution of this

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[20] Death on the High Seas Act ("DOHSA"), Mar. 30, 1920, ch. 111, 41 Stat. 537, 46 U.S.C. app. §§ 761-62, 764-67.

Court's jurisdiction. Once Sudan pursues an interlocutory appeal on the question of jurisdiction, or decides not to, it will be appropriate to resolve the issue of what substantive source of law applies to Plaintiffs' claims. Accordingly, this question will be held under advisement until after Sudan answers the Complaint, if it ultimately must do so.

Moreover, even if the Court did resolve the dispute over what substantive source of law applies in this case, if any, the Court still could not resolve Defendants' statute of limitations plea at this juncture. The statute of limitations is an affirmative defense. Fed. R. Civ. P. 8(c). Determining the point when a cause of action accrues for purposes of triggering the applicable limitations period, deciding whether a claim is subject to equitable tolling, and ascertaining whether the limitations period has expired, are mixed questions of law and fact that cannot be settled on the pleadings alone. A claim should only be dismissed under the applicable limitations period "if undisputed facts establish the time when the cause of action accrued." *American Hotel Mgmt. Assoc., Inc. v. Jones*, 768 F.2d 562, 568 (4th Cir. 1985). When there is a dispute over the facts related to the limitations period, the issue must ultimately be resolved by a trier of fact. *See Brown v. American Broadcasting Co., Inc.*, 704 F.2d 1296, 1304 (4th Cir. 1983) ("[T]he issue of when plaintiff knew, or reasonably should have known of the existence of her cause of action, is a question to be resolved by a jury."). In this case, even if the DOHSA was held up as the sole source of Plaintiffs' cause of action, they contend that the limitations period has not yet expired based on when they learned of Defendant's alleged material support to Al-Qaeda. (*See* Pl.'s Memo. in Opp. at 27, Doc. No. 44.) *See also White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1432-33 (11th Cir. 1997) (holding that a DOHSA cause of action accrues when a plaintiff knew or should have known of

his injury and its cause). This is an issue of fact that cannot be resolved on the pleadings alone.

For all of these reasons, the best course is to take the Motion to Dismiss for failure to state a claim upon which relief can be granted, and all the issues presented therein, **UNDER ADVISEMENT** until sometime after Sudan answers the Complaint, if it ultimately must do so.

VI. CONCLUSION AND ORDER

For the foregoing reasons,

1) Defendant's Motion to Dismiss for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process, is **DENIED** on each ground;

2) Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted is **TAKEN UNDER ADVISEMENT** until sometime after Defendant files an answer to the Complaint, if it ultimately must do so;

3) Defendant's Motion to Extend the Date for Filing Defendant's Answer to Plaintiffs' Amended Complaint, which is unopposed by Plaintiffs, is **GRANTED,** subject to the following conditions:

    a) Defendant is **ORDERED** to answer Plaintiffs' Complaint not more than ten (10) days from the date of this Memorandum Opinion and Order; or

b) In the event that this matter is stayed for an interlocutory appeal, and in the event that the appeal is denied, Defendant is **ORDERED** to answer Plaintiffs' Complaint not more than three (3) days from the date of the issuance of the mandate from the United States Court of Appeals. *See* Fed. R. App. P. 41.

The Clerk of the Court is **DIRECTED** to transmit a copy of this Memorandum Opinion and Order to all counsel of record via United States mail. The Clerk of the Court is further **DIRECTED** to also transmit a copy of this Memorandum Opinion and Order to the lead counsel of record via facsimile.

IT IS SO ORDERED.

/s/_____
United States District Judge

Norfolk, Virginia

August, 26, 2005

APPENDIX C

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1330 (2000):

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

. . . .

(Added Pub.L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.)

28 U.S.C. § 1604 (2000):

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

28 U.S.C. § 1605(a)(7) (2000 and Supp. III (2005)):

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . .

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

. . . .

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892, and amended Pub.L. 100-640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(a), Apr. 24, 1996, 110 Stat. 1241; Pub.L. 105-11, Apr. 25, 1997, 111 Stat. 22; Pub.L. 107-77, Title VI, § 626(c), Nov. 28, 2001, 115 Stat. 803; Pub.L. 107-117, Div. B, Ch. 2, § 208, Jan. 10, 2002, 115 Stat. 2299.)